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Supreme Court, U.S.
FILED

07-351 JUL 18 2007

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Docket No. _____

THE SUPREME COURT OF THE UNITED STATES

Billy R. Delp, Jr.,

Petitioner,

v.

Nu-Way Energy Corporation,

Respondent.

On Petition for Certiorari to the Tenth District Court of Appeals of Texas at Waco

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Part 1–Lower Court Rulings (Items 1-6)

1 *Nu-Way Energy Corporation, Appellant, v. Billy R. Delp, Jr., Appellee*, No. 10-05-00065-CV (Tex. App.–Waco Sept. 6, 2006, pet. denied) (Judgment):

TENTH COURT OF APPEALS

Chief Justice *Tom Gray*
Justice *Bill Vance*
Justice *Felipe Reyna*

McLennan County Courthouse
501 Washington Avenue, Rm 415
Waco, Texas 76701-1327
Phone: (254) 757-5200 Fax: (254) 757-2822

Clerk *Sharri Roessler*

September 6, 2006

In accordance with the enclosed Opinion, below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 6th day of September, 2006.

10-05-00065-CV NU-WAY ENERGY CORPORATION v. BILLY R. DELP, JR.- ON APPEAL FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY - TRIAL COURT NO. 96-183839-00 - REVERSED AND REMANDED - Opinion by Justice Reyna; Chief Justice Gray concurring.

"This cause came on to be heard on the transcript of the record, and same being considered, because it is the opinion of this Court that there was error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment of the court below be, and hereby is, reversed and this cause is

remanded to the 96th District Court of Tarrant County, Texas, in accordance with the opinion of this Court. It is further ordered that Appellee Billy R. Delp, Jr. pay costs of appeal and that this decision be certified below for observance."

2 *Nu-Way Energy Corporation, Appellant, v. Billy R. Delp, Jr., Appellee*, No. 10-05-00065-CV (Tex. App.–Waco Sept. 6, 2006, pet. denied) (Opinion) (Opinion published at 205 S.W.3d 667):

IN THE
TENTH COURT OF APPEALS

No. 10-05-00065-CV

NU-WAY ENERGY CORPORATION,
Appellant

v.

BILLY R. DELP, JR.,
Appellee

From the 96th District Court
Tarrant County, Texas
Trial Court No. 96-183839-00

OPINION

Nu-Way Energy Corporation filed suit against Billy R. Delp, Jr. to collect on a $2 million judgment. Nu-Way sought a turnover order for assets held in Delp's individual retirement account, including a 1998 judgment rendered in favor of the IRA, or alternatively garnishment of the proceeds of that judgment. Delp responded that the IRA, the judgment, and the proceeds of the judgment are exempt from creditors because the IRA was confirmed as an exempt asset in his bankruptcy proceedings and the judgment was obtained with proceeds from the IRA. The trial court rendered judgment in Delp's favor.

Nu-Way presents ten issues challenging the court's findings and conclusions that the IRA is exempt and that the judgment and its proceeds are exempt and challenging the manner in which the court awarded attorney's fees to Delp. We will reverse and remand.

Background

Delp was president of Nu-Way in 1991 when he filed a Chapter 11 bankruptcy. During the course of the bankruptcy proceedings, Nu-Way obtained a judgment against Delp in excess of $2 million for breach of fiduciary duty. Because of the nature of Delp's liability, the judgment is a non-dischargeable debt.

Delp listed the IRA in his bankruptcy schedule as an exempt asset. Neither Nu-Way nor any other creditor objected to the designation of the IRA as an exempt asset.

Before confirmation of the reorganization plan in Delp's bankruptcy, Delp executed an agreement with First Financial Resolution Enterprises, Inc. ("First Financial"). Under this agreement, Delp agreed to purchase: (1) an unsecured debt evidenced by a note made by Economy Oil Company in favor of the Federal Asset Management Company ("FAMCO") in the original principal sum of $660,567; and (2) a secured claim against Economy in the amount of $350,000 held by FAMCO and

secured by 175,000 units in FFP Partners, L.L.P. First Financial agreed to release Delp from a personal guaranty he had made in support of a $1.6 million note Economy had executed in favor of Texas American Bank.[1]

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1 Both the unsecured debt and the secured claim arose from Economy's own bankruptcy. These claims originated with the $1.6 million note. This note was secured by the 175,000 FFP units and was further supported by the personal guarantees of Delp and of John Harvison, who is an officer and director of Nu-Way and Economy. The bankruptcy court divided this note into the $350,000 secured claim and a $1.3 million unsecured debt. The Economy bankruptcy plan called for the $1.3 million debt to be halved. Hence, Economy executed the $660,567 note in favor of FAMCO.

Although Delp initially agreed to purchase both the unsecured debt and the secured claim, a company owned by his son purchased the unsecured debt. Delp withdrew $250,000 from his IRA to purchase the secured claim. First Financial transferred the secured claim by executing an assignment in favor of "Bank One, Trustee for Billy R. Delp, Jr. IRA."[2] At the same time, First Financial released Delp from any further liability on his personal guaranty.

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2 Although the assignment was to Bank One, First Financial's endorsement on the original $1.6 million makes the note payable to Delp in his individual capacity.

Litigation ensued between Economy and Delp regarding the substance of the agreement between them. Delp believed that the transaction conveyed the FFP units to his IRA, while Economy contended that Delp or his IRA acquired only a security interest in the units. A certificate of ownership of the FFP units was placed in the registry of the court pending the resolution of the litigation. The trial court in the Economy suit rendered judgment that Delp's IRA held the note, secured by the FFP units, and that Economy

owned the units themselves. The judgment ordered Economy to pay $350,000 to the Delp IRA and decreed that this sum, if not paid, would be satisfied from the FFP units.

Nu-Way contends that the IRA lost its exempt status because Delp withdrew funds from the IRA for his own benefit. Nu-Way primarily seeks the turnover of the Economy judgment or to garnish the proceeds of that judgment, which Economy has now satisfied. In the alternative, Nu-Way seeks turnover of sufficient funds in the IRA to satisfy its judgment. Delp contends that Nu-Way cannot challenge the exempt status of his IRA because Nu-Way did not challenge its exempt status during his bankruptcy proceedings or during the Economy litigation. Delp also suggests that because the Economy judgment was rendered in favor of his IRA, neither the judgment nor its proceeds can be reached by Nu-Way to satisfy its judgment against Delp individually.

The court made numerous findings of fact and conclusions of law in this case. The court primarily found and concluded that Nu-Way's claims are barred by res judicata and collateral estoppel. The court also found and concluded that Nu-Way cannot reach the Delp IRA because Nu-Way did not object to Delp's assertion in bankruptcy court that the IRA was exempt.

Despite these findings and conclusions, the court went further and addressed the merits of Nu-Way's claims. The court concluded among other things that: (1) Nu-Way cannot have turnover of the Economy judgment because that judgment was rendered in favor of the Delp IRA rather than Delp in his individual capacity;[3] (2) the Economy judgment is exempt from prepetition creditors because it is the property of the IRA, which was declared exempt in Delp's bankruptcy proceedings; and (3) Nu-Way failed to prove that the IRA lost its exempt status at any time thereafter.

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3 For example, in Conclusion of Law No. 76, the court recites:

> The turnover relief requested may not be granted either. It is Delp IRA that has the claim against the assets in the Economy registry. Delp IRA is a juridically distinct entity from Delp. Therefore, its rights as a judgment claimant in the Economy case cannot be adjudicated here, certainly not without its joinder in this litigation.

The court also found that Nu-Way committed a breach of contract (the bankruptcy plan) by seeking to recover an asset held by the Delp IRA. The court thus awarded Delp trial attorney's fees of $385,925 and appellate attorney's fees of as much as $85,000. The court ordered that these fees be paid directly to Delp's attorneys.

Standard of Review

The parties tried this suit on a joint stipulation of the pertinent facts. *See* TEX. R. CIV. P. 263.

> An agreed statement of facts under rule 263 is similar to a special verdict; it is the parties' request for judgment under the applicable law. The only issue on appeal is whether the trial court properly applied the law to the agreed facts. The appellate court is limited to those facts unless other facts are necessarily implied from the express facts in the statement. In an appeal of an "agreed" case, there are no presumed findings in favor of the judgment, and the pleadings are immaterial.
>
> Because the issue on appeal is a pure question of law, the appellate court performs a de novo review. A de novo review is less deferential than ordinary reviews because a trial court has no discretion in deciding what the law is or in properly applying it.

C & G, Inc. v. Jones, 165 S.W.3d 450, 453 (Tex. App.–Dallas 2005, pet. denied) (*quoting State Farm Lloyds v. Kessler*, 932 S.W.2d 732, 735 (Tex. App.–Fort Worth 1996, writ denied)).

Mootness

Delp contends that Nu-Way's claims are now moot because the Economy judgment has been satisfied. Nu-Way concedes that its garnishment claim is moot. However, Nu-Way responds that its claim for turnover relief is not moot because it is entitled to turnover of the proceeds of the judgment and because it seeks turnover of as much of the other funds in the Delp IRA which are determined to be non-exempt as necessary to satisfy Nu-Way's Judgment against Delp.

"A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005).

Here, as Nu-Way concedes, no further controversy exists as to garnishment of the judgment debt owed to the Delp IRA by Economy because the judgment has been paid. Accordingly, we dismiss as moot Nu-Way's sixth issue, which challenges the trial court's denial of garnishment relief.

However, because Nu-Way essentially seeks turnover of the entirety of the Delp IRA to satisfy Nu-Way's judgment, the remainder of Nu-Way's claims are not moot.

Res Judicata

Nu-Way contends in part of its third issue that the court erred by concluding that events during the bankruptcy proceedings preclude Nu-Way from pursuing its claims in this suit under the doctrine of res judicata, collateral estoppel, or a similar theory. Nu-Way contends in its fourth issue that the court erred by concluding that the Economy judgment precludes Nu-Way from

recovering turnover of that judgment under principles of res judicata, collateral estoppel, or a similar theory.

The trial court concluded that (1) Nu-Way's failure to object to the scheduling of the Delp IRA as an exempt asset in the bankruptcy proceedings, (2) the confirmation of the bankruptcy plan, and (3) the rendition of judgment in the Economy litigation all bar Nu-Way's claims under the doctrine of res judicata.

The conclusion that Nu-Way's claims are barred by events during the bankruptcy proceedings is governed by federal law. *See John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 287 (Tex. 2002); *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App.–Waco 2004, pet. denied). A claim of res judicata under federal law consists of four elements: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been a final judgment on the merits; and (4) the same cause of action must be involved in both cases. *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 386 (5th Cir. 2000); *SMI/USA, Inc. v. Profile Techs., Inc.*, 38 S.W.3d 205, 211 (Tex. App.–Waco 2001, no pet.).

Even if these four elements are present however, res judicata will not bar a subsequent action unless the plaintiff "could and should have brought its . . . claims in the former proceedings." *Osherow*, 200 F.3d at 388. To resolve this question, "we consider whether and to what extent [Nu-Way] had actual or imputed awareness" before the confirmation hearing that Delp had caused funds to be withdrawn from his IRA for the acquisition of the secured claim against Economy. *See id.*

Delp contends that the allegations throughout the course of the parties' litigation in state and federal court show that "Nu-Way obviously distrusted Delp all along the way." Thus, Delp contends in effect that Nu-Way should have known he might withdraw funds from his IRA and should have conducted periodic

examinations of Delp under Bankruptcy Rule 2004(a) to determine whether he was engaging in such conduct.

Delp filed his bankruptcy schedules in November 1991. The creditors' meeting was conducted in December 1991, and thus, the deadline for filing objections to the claimed exemptions listed in Delp's bankruptcy schedules was in January 1992. *See* FED. R. BANKR. P. 4003(b). Delp did not acquire the secured claim against Economy until December 1992. The bankruptcy court signed an order confirming a plan of reorganization in April 1993. The first indication in the record that Nu-Way had some knowledge that Delp may have been involved in a transaction regarding the secured claim against Economy is a deposition subpoena served on Delp's son in September 1993 in connection with the adversary proceeding. Delp's son responded by seeking a protective order from the bankruptcy court. When a similar subpoena was served on Delp's attorney, the attorney filed a motion for protective order, as did Delp and his wife. A federal magistrate ordered discovery of the documents sought in January 1994.

Nu-Way contends that it could not have challenged the propriety of the acquisition of the secured claim against Economy before entry of the confirmation order because it did not learn of the acquisition until afterward. The record supports Nu-Way's contention, and Delp does not point to any contrary evidence in the record nor otherwise contradict Nu-Way's assertion that it did not learn of the acquisition until after entry of the confirmation order.

There is nothing in the record to indicate that Nu-Way "had actual or imputed awareness" before the confirmation hearing that Delp had caused funds to be withdrawn from his IRA for the acquisition of the secured claim against Economy. *See Osherow*, 200 F.3d at 388. Accordingly, the bankruptcy proceedings do not bar Nu-Way's present suit under the federal-law doctrine of res judicata. *Id.*

The trial court's conclusion that rendition of judgment in the Economy litigation bars Nu-Way's claims is governed by state law. A claim of res judicata under Texas law consists of three elements: (1) a final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second suit based on claims actually litigated in the first suit or claims which should have been litigated in the first suit. *See State & County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001) (per curiam); *Nelson v. Williams*, 135 S.W.3d 202, 206 (Tex. App.–Waco 2004, pet. denied); *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 368 (Tex. App.–Fort Worth 2003, pet. denied).

The Supreme Court has adopted a transactional approach to determine whether a particular claim should have been pursued in prior litigation. *See State & County Mut. Fire Ins. Co.*, 52 S.W.3d at 696; *Sanders v. Blockbuster, Inc.*, 127 S.W.3d 382, 386 (Tex. App.–Beaumont 2004, pet. denied); *Compass Exploration, Inc. v. B-E Drilling Co.*, 60 S.W.3d 273, 278 (Tex. App.–Waco 2001, no pet.). This approach "provides that a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose." *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 631 (Tex. 1992) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)). This determination "requires an analysis of the factual matters that make up the gist of the complaint, without regard to the form of action." *Id.* at 630; *accord Loy v. Harter*, 128 S.W.3d 397, 406 (Tex. App.–Texarkana 2004, pet. denied); *Kothmann v. Cook*, 113 S.W.3d 471, 474-75 (Tex. App.–Amarillo 2003, no pet.).

> What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial

> unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982) (quoted by *Barr*, 837 S.W.2d at 631); *accord Sanders*, 127 S.W.3d at 386; *Compass Exploration*, 60 S.W.3d at 278.

A review of the jury charge in the Economy suit reveals that the following matters were at issue in that litigation: (1) whether Delp breached his fiduciary duty as Economy's president and director by acquiring the secured claim from FFRE or by causing the unsecured debt to be assigned to his son's company; (2) whether any negligence on Delp's part in connection with these transactions was a proximate cause of damages to Economy; (3) whether Delp committed fraud against Economy; (4) whether Economy had waived its claims; and (5) whether Delp and/or the Delp IRA acquired ownership of the FFP units from FFRE or a security interest in those units.[4]

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[4] The jury found against Economy on its claims and determined that Delp and/or the Delp IRA acquired ownership of the FFP units rather than a security interest in those units. The trial court rendered judgment notwithstanding the verdict on this latter issue, stating in Conclusion of Law No. 69 "that the Delp IRA owns a secured claim for $350,000, with the FFP Units . . . pledged as collateral."

Conversely, Nu-Way's suit against Delp seeks turnover of the Economy judgment or garnishment of its proceeds, or in the alternative, turnover of sufficient funds in the IRA to satisfy Nu-Way's judgment. Nu-Way also seeks declaratory relief in the form of a judgment declaring that Delp's use of funds from his IRA to purchase the secured claim caused his entire IRA to lose its exempt status under federal law or, alternatively, caused the judgment itself to lose its exempt status notwithstanding its being held by the Delp IRA.

The claims in both lawsuits revolve around the transaction in which the Delp IRA obtained the secured claim against Economy. The Economy suit focused on whether Delp's conduct in this transaction violated any legal obligations owed to Economy. Conversely, Nu-Way's suit focuses on whether Delp's use of funds from his IRA to obtain the secured claim and release caused his IRA or at least the Economy judgment to lose its exempt status.

Applying the pragmatic approach adopted by the Supreme Court in *Barr*, we conclude that Nu-Way's claims are not claims which should have been litigated in the Economy suit for purposes of res judicata. Although the facts of both suits are "related in time [and] origin," they are not "related" by the "motivation" of the respective plaintiffs. *See Barr*, 837 S.W.2d at 631; *Sanders*, 127 S.W.3d at 386; *Compass Exploration*, 60 S.W.3d at 278; RESTATEMENT (SECOND) OF JUDGMENTS § 24(2).

Economy had no motivation to litigate the issue of whether Delp's use of funds from his IRA to purchase the secured claim and release rendered his IRA or part of it no longer exempt under federal law. Conversely, Nu-Way has no motivation to litigate the issue of whether Delp's conduct in purchasing the secured claim violated any fiduciary duties he owed Economy or otherwise caused Economy to suffer compensable injury. *See Heard v. Moore*, 101 S.W.3d 726, 729 (Tex. App.–Texarkana 2003, pet. denied) (plaintiff's suit against defendants not barred by res judicata even though defendants as third-party plaintiffs obtained default judgment against third-party defendant in same suit for contribution and indemnity because plaintiff "was procedurally neutral" as to the claim against the third-party defendant and had no obligation "to inject herself" into that dispute); *In re J.G.W.*, 54 S.W.3d 826, 833 (Tex. App.–Texarkana 2001, no pet.) (father's claims against ex-wife and her new husband for intentional infliction of emotional distress, interference with child custody, and civil conspiracy which could have been litigated in prior suit to modify custody and support

provisions of divorce decree not barred by res judicata because these claims "would only be ancillary" to the modification proceeding); *Cain v. Cain*, 746 S.W.2d 861, 863 (Tex. App.–El Paso 1988, writ denied) (former wife's turnover action for husband's retirement payments not barred by res judicata even though she did not seek turnover relief in prior suit to enforce divorce decree).

Collateral Estoppel

Under both federal and state law, a claim of collateral estoppel has three elements: "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Kenedy Mem'l Found.*, 90 S.W.3d at 288 (quoting *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994)); *accord Fiallos v. Pagan-Lewis Motors, Inc.*, 147 S.W.3d 578, 584 (Tex. App.–Corpus Christi 2004, pet. denied).

Collateral estoppel is more narrow than res judicata because it precludes only the relitigation of issues which were actually litigated in a prior suit. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985); *Fiallos*, 147 S.W.3d at 584; *Tex. Capital Secs. Mgmt., Inc. v. Sandefer*, 80 S.W.3d 260, 264 (Tex. App.–Texarkana 2002, no pet.); *McRae Exploration & Prod., Inc. v. Reserve Petroleum Co.*, 962 S.W.2d 676, 680 (Tex. App.–Waco 1998, pet. denied). "Thus, unlike the broader res judicata doctrine, collateral estoppel analysis does not focus on what could have been litigated, but only on what was actually litigated and essential to the judgment." *Van Dyke*, 697 S.W.2d at 384; *Tex. Capital Sec. Mgmt.*, 80 S.W.3d at 264; *accord McRae Exploration*, 962 S.W.2d at 680. Whether collateral estoppel applies to a particular judgment is a question of law. *McRae Exploration*, 962 S.W.2d at 680.

Here, as demonstrated in the discussion regarding Delp's

state-law res judicata claim, the Economy litigation and the Nu-Way litigation involve different issues. True, the Economy litigation resolved the issue of whether Delp or the Delp IRA "owns" the secured claim against Economy. However, this is not legally relevant to Nu-Way's claims in the present suit because turnover relief is available to reach property in the judgment debtor's possession or property subject to his control. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)(1) (Vernon Supp. 2006); *Gerdes v. Kennamer*, 155 S.W.3d 541, 546 (Tex. App.–Corpus Christi 2004, no pet.); *Bay City Plastics, Inc. v. McEntire*, 106 S.W.3d 321, 325 (Tex. App.–Houston [1st Dist.] 2003, pet. denied). Therefore, because the Economy litigation and the Nu-Way litigation involve different issues, it cannot be said that Nu-Way's suit is barred by collateral estoppel.

Waiver

The trial court also concluded that Nu-Way waived its right to challenge the exempt status of the Delp IRA because Nu-Way did not file an objection to Delp's bankruptcy schedule identifying the IRA as exempt. As indicated above however, Nu-Way had no basis to raise such an objection until after the time for filing objections had passed. *See* FED. R. BANKR. P. 4003(b). Therefore, the court erred by concluding that Nu-Way had waived its right to challenge the exempt status of the IRA.

Accordingly, we sustain Nu-Way's third issue in part and Nu-Way's fourth issue in its entirety.

Exempt Status of IRA Under Bankruptcy Plan

Nu-Way also contends in its third issue that the bankruptcy plan "does not preclude Nu-Way from collecting its judgment against any currently non-exempt asset, even if such asset is traceable to proceeds of the IRA." Nu-Way contends in its fifth issue that the court erred by concluding that no asset traceable to the [Delp] IRA . . . will ever be available to satisfy

Nu-Way's judgment."

In particular, the trial court concluded that the bankruptcy plan is "a binding and enforceable contract" and thus the identification of the Delp IRA in the plan as an exempt asset means "Nu-Way cannot . . . raid [the] Delp IRA for satisfaction of its prepetition claims against Delp." Thus, the court concluded that Nu-Way breached this "contract" by attempting to enforce its lien against an asset held in the name of the Delp IRA.

Under section 522(b) of the Bankruptcy Code, a debtor may choose to withdraw certain property from his bankruptcy estate using exemptions provided by either state or federal law, unless the debtor's state "opts out" of the federal exemptions. *See* 11 U.S.C.A. § 522(b) (West Supp. 2006); *Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835, 114 L. Ed. 2d. 350 (1991). "Texas is part of a decided minority of states that have not opted out." *In re Brown*, 299 B.R. 425, 427 (Bankr. N.D. Tex. 2003).[5]

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5 If the debtor's state "opts out," then the debtor is limited to the exemptions provided by state law. *See Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835, 114 L. Ed. 2d. 350 (1991).

Here, Delp chose to claim the exemptions provided by Texas law. Thus, he identified the Delp IRA as an exempt asset under section 42.0021(a) of the Property Code. The version of section 42.0021(a) in effect at the time of Delp's bankrtupcy provided:

> In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity

> or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity, including a simplified employee pension plan, is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. A person's right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the federal Employee Retirement Income Security Act of 1974. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

Act of May 27, 1989, 71st Leg., R.S., ch. 1122, § 1, 1989 Tex. Gen. Laws 4627, 4627-28 (amended 1995) (current version at TEX. PROP. CODE ANN. § 42.0021(a) (Vernon Supp. 2006)) (hereinafter, "section 42.0021").

Thus, under the law then in effect, Delp claimed an exemption for "the assets held in . . . [an] individual retirement account." *See id.* At that time, "the assets held" in the Delp IRA consisted of funds in the amount of $1,118,138.

Under section 522(c) of the Bankruptcy Code, such funds are "not liable during or after the case for any [prebankruptcy] debt" with certain exceptions not applicable here. *Id.* § 522(c)

(West 2004 & Supp. 2006); *see S & C Home Loans, Inc. v. Farr (In re Farr)*, 278 B.R. 171, 176-77 (B.A.P. 9th Cir. 2002); *In re Hyde*, 334 B.R. 506, 513 (Bankr. D. Mass. 2005); *Lowe v. Yochem (In re Reed)*, 184 B.R. 733, 738 (Bankr. W.D. Tex. 1995). "The legislative history of this section also shows that it was enacted to insulate exempt property from any nondischargeable prepetition debts which are not listed as exceptions." *S & C Home Loans*, 278 B.R. at 177.

The issue here is whether any portion of the funds in the Delp IRA lost their exempt status under the Bankruptcy Code because funds from that account were used to acquire the secured claim against Economy and the release of Delp's personal guaranty. It is undisputed that the secured claim would not have been an exempt asset if Delp had acquired it before filing the bankruptcy petition. *See Leibman v. Grand*, 981 S.W.2d 426, 435 (Tex. App.–El Paso 1998, no pet.) (Texas law does "not provide an exemption for currency, checks, or negotiable instruments").

Section 42.0021(c) formerly provided:

> Amounts distributed from a plan or contract entitled to the exemption under Subsection (a) are not subject to seizure for a creditor's claim for 60 days after the date of distribution if the amounts qualify as a nontaxable rollover contribution under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986.

Act of May 27, 1989, 71st Leg., R.S., ch. 1122, § 1, 1989 Tex. Gen. Laws 4627, 4628 (amended 1995) (current version at TEX. PROP. CODE ANN. § 42.0021(c) (Vernon Supp. 2006)).

$250,000 was withdrawn from the Delp IRA to acquire the secured claim and release. These proceeds would remain exempt under section 42.0021(c) if they were used as a rollover contribution for another qualifying account. *See id.* However,

they were not. Rather, the proceeds were used to purchase a non-exempt asset. *See Leibman*, 981 S.W.2d at 435.

Delp cites *Lowe* for the proposition "that a postpetition change in the character of property properly claimed as exempt will not change the status of that property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring postpetition can change that fact." *Lowe*, 184 B.R. at 737. We fully agree, insofar as this proposition goes. But the true meaning of this statement is that "[p]roperty which is claimed as exempt is deemed no longer property of the [bankruptcy] estate, and its subsequent transformation into proceeds which would be nonexempt under state law does not bring these proceeds back into the bankruptcy estate." *In re Walston*, 190 B.R. 855, 859 (Bankr. S.D. Ill. 1996); *see also Lowe*, 184 B.R. at 738 ("The practical implication is that such property is forever protected from the claims of pre-petition creditors, and is essentially removed from the bankruptcy process.").

With this understanding, the application of this principle in cases like Delp's can be readily seen. For example, in *S & C Home Loans*, the debtor had claimed the $100,000 homestead exemption allowed by California law. 278 B.R. at 173. S & C Home Loans obtained a nondischargeable judgment against the debtor for fraud. S & C sought to satisfy its judgment lien against the nonexempt equity in the debtor's residence, which was shown to have a fair market value significantly in excess of the combined value of the exemption and the mortgage lien secured by the residence. *Id.* at 173-74. The bankruptcy appellate panel held that S & C's judgment lien could reach all but the exempt portion of the debtor's interest in the homestead. *Id.* at 181.

In a case with similar facts, a Massachusetts bankruptcy court likewise held that the holder of a nondischargeable claim against the debtor could enforce its rights against the debtor's homestead to the extent "the Debtor had equity in the Property over and above the amount of his claimed exemption and any

non-avoidable liens." *Hyde*, 334 B.R. at 513.

Conversely, in *Lowe* and similar cases, the bankruptcy trustee sought to bring into the bankruptcy estate assets which were exempt when the bankruptcy petition was filed but which had been converted into nonexempt assets.

In *Lowe*, the debtor sold his exempt homestead (a ranch) for cash and a note during the pendency of his bankruptcy. After discharge, the trustee brought an adversary proceeding alleging that the note had become property of the bankruptcy estate after six months because it was a part of the proceeds from the sale of the homestead. *See Lowe*, 184 B.R. at 735; *see also* TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 2006) (proceeds from sale of homestead are exempt for six months after sale). The bankruptcy judge rejected this assertion:

> Nothing in section 522(c) even vaguely suggests that, as a precondition to enjoying the protections of that provision, the debtor must maintain the exempt character of the property. If the debtor decides, as part of his fresh start, to sell the house, buy a Winnebago, and travel around the country from campground to campground with his wife and his dog, the statute appears to place no impediment in his path. True enough, the Winnebago may not be exempt from obligations he incurs after his discharge (depending on state law), but it should not be vulnerable to the satisfaction of any of the debtor's prepetition obligations. Were the rule otherwise, then estates could be reopened to administer such proceeds at virtually any time, robbing bankruptcy administration of any sort of meaningful finality, and robbing the bankruptcy discharge of its efficacy.

> We join the majority of courts that have ruled on this issue, concluding that a postpetition transformation of exempt property into a form of property which would not be exempt under state law does not return the property to the estate.

Lowe, 184 B.R. at 738; *accord In re Konnoff*, 341 B.R. 28, 32 (Bankr. D. Ariz. 2006); *Walston*, 190 B.R. at 859.

However, the bankruptcy judge in each of these cases explicitly noted that, even though these proceeds could not be reached by the bankruptcy trustee, the proceeds were not exempt from postpetition creditors. *See Konnoff*, 341 B.R. at 32 n.23; *Walston*, 190 B.R. at 859; *Lowe*, 184 B.R. at 738 n.7. For our purposes, a prepetition creditor holding a nondischargeable judgment lien has the same right to attach non-exempt assets acquired by a debtor after discharge as a postpetition creditor. *See S & C Home Loans*, 278 B.R. at 181; *Hyde*, 334 B.R. at 513.

Therefore, we hold that the trial court erred by concluding that Nu-Way's judgment lien did not attach to the secured claim against Economy because of its acquisition with funds from the Delp IRA. Accordingly, we sustain the remainder of Nu-Way's third issue and the entirety of its fifth issue.

Exempt Status of IRA Under Internal Revenue Code

Nu-Way contends in its first and second issues respectively that the court erred by refusing to find that the Delp IRA lost its exempt status because the use of funds from that account to acquire the secured claim and release is a prohibited transaction under the Internal Revenue Code and because the Economy judgment was not reported to the Internal Revenue Service.

Under section 408(e)(2)(A) of the Internal Revenue Code, an IRA "ceases to be an individual retirement account" if the

account holder "engages in any transaction prohibited by section 4975." 26 U.S.C.A. § 408(e)(2)(A) (West Supp. 2006). Thus, an IRA loses its status as exempt property in a bankruptcy proceeding if the account holder engages in a prohibited transaction under section 4975. *See In re Hughes*, 293 B.R. 528, 530 (Bankr. M.D. Fla. 2003).

Nu-Way contends that Delp's use of funds from the IRA for the acquisition of the secured claim and release constituted a "prohibited transaction" under several provisions of section 4975: (1) the "lending of money or other extension of credit between [the IRA] and a disqualified person"; *id.* § 4975(c)(1)(B) (West Supp. 2006); (2) the "use by or for the benefit of a disqualified person of the income or assets of [the IRA]"; *see id.* § 4975(c)(1)(D) (West Supp. 2006); and (3) the use of "the income or assets of [the IRA] in [Delp's] own interest or for his own account." *Id.* § 4975(c)(1)(E) (West Supp. 2006).

Under subdivision (c)(1)(D), the parties dispute whether Delp received a "benefit" from the FFRE transaction. To recap the facts, $250,000 was paid from the Delp IRA to FFRE at Delp's direction. In return, First Financial assigned the secured claim against Economy to the IRA and released Delp from the personal guaranty he had previously given for the Economy debt.

Delp contends primarily that he received no "benefit" from the release because his guaranty was then worthless (as evidenced by his bankruptcy). We disagree.

A guaranty agreement "creates a secondary obligation whereby the guarantor promises to answer for the debt of another and may be called upon to perform once the primary obligor has failed to perform." *Republic Nat'l Bank v. Nw. Nat'l Bank*, 578 S.W.2d 109, 114 (Tex. 1978); *accord Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469, 475 (Tex. App.–Corpus Christi 1997, writ denied); *Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 185 (Tex. App.–Fort Worth 1995, no writ). In bankruptcy proceedings, a

debtor's guaranty is treated as a contingent debt. *See In re Pennypacker*, 115 B.R. 504, 507 (Bankr. E.D. Pa. 1990); *Craig Corp. v. Albano (In re Albano)*, 55 B.R. 363, 366 (Bankr. N.D. Ill. 1985); *Guar. Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 433 (Tex. Civ. App.–Dallas 1978, writ ref'd n.r.e.).

It has been held in bankruptcy proceedings that a guarantor "derives measurable economic benefit from a payment on the guaranteed debt, to the extent the [guarantor's] contingent liability on the personal guaranty is reduced." *Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 797 (1st Cir. 1992). If a mere reduction in a guarantor's contingent liability constitutes a benefit to the guarantor, then a complete release from liability on a guaranty is likewise a benefit to the guarantor.

The fact that Delp was insolvent at the time of the release is irrelevant. *See Meridith Millard Partners v. Balcor Real Estate Fin., Inc. (In re Meridith Hoffman Partners)*, 12 F.3d 1549, 1555-56 (10th Cir. 1993). Whether he received a benefit from the release must be determined as of the date of the release. *Id.* At the time of the release (i.e., before confirmation of the bankruptcy plan), Delp remained liable on the guaranty. Thus, he received a benefit from the release. *Id.*

Therefore, because funds from Delp's IRA were used for his benefit, this was a prohibited transaction under section 4975(c)(1)(D). *See O'Malley v. Commissioner*, 972 F.2d 150, 153 (7th Cir. 1992) (payment of disqualified person's legal fees by pension fund was prohibited transaction);[6] *Rollins v. Commissioner*, T.C. Memo 2004-260, 88 T.C.M. (CCH) 447, 2004 Tax Ct. Memo. LEXIS 272, at *31 (T.C. 2004) (disqualified person committed prohibited transaction where he "sat on both sides of the table"); *Harris v. Commissioner*, T.C. Memo 1994-22, 67 T.C.M. (CCH) 1983, 1994 Tax. Ct. Memo LEXIS 31, at *4 (T.C. 1994) (owners of IRA committed prohibited transaction by using funds from IRA to purchase personal residence).

6 The trial court recites in Conclusion of Law No. 96, "The documentary evidence before the Court demonstrates Delp's invasion of the IRA corpus to defend against his IRA's assets being taken from him." This too appears to constitute a prohibited transaction, though Nu-Way does not contend that it is. *See O'Malley v. Commissioner*, 972 F.2d 150, 153 (7th Cir. 1992).

Because Delp engaged in a prohibited transaction in December 1992, his IRA "cease[d] to be an individual retirement account as of the first day of such taxable year." 26 U.S.C.A. § 408(e)(2)(A). Under section 42.0021(a), an IRA "is exempt from attachment, execution, and seizure for the satisfaction of debts unless the . . . account does not qualify under the applicable provisions of the Internal Revenue Code of 1986." Act of May 27, 1989, 71st Leg., R.S., ch. 1122, § 1, 1989 Tex. Gen. Laws at 4627-28 (amended 1995). Accordingly, because the Delp IRA no longer qualifies as an individual retirement account under the Internal Revenue Code, it is no longer exempt from creditors under section 42.0021. *See Jones v. Am. Airlines, Inc.*, 131 S.W.3d 261, 270 (Tex. App.–Fort Worth 2004, no pet.).

As we have already explained, when an asset which was exempt during a bankruptcy proceeding loses its exempt status, the holder of a nondischargeable claim may seek to enforce that claim against the previously exempt asset. *See* S & C *Home Loans*, 278 B.R. at 181; *Hyde*, 334 B.R. at 513. For these reasons, we sustain Nu-Way's first and second issues.

Turnover Relief

Nu-Way contends in its seventh issue that the court abused its discretion by denying its request for turnover of the funds in the Delp IRA.

We have determined that the entirety of the funds in the Delp IRA are not exempt from creditors. Section 31.002(a)(2) of the Civil Practice and Remedies Code provides that a "judgment

creditor is entitled" to turnover relief for property that "is not exempt from attachment, execution, or seizure for the satisfaction of liabilities." TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)(2) (Vernon Supp. 2006).

A creditor may obtain turnover relief for "property that is in the debtor's possession or is subject to the debtor's control." *Id.* § 31.002(b)(1); *see also Gerdes*, 155 S.W.3d at 546; *Bay City Plastics*, 106 S.W.3d at 325. The parties have stipulated that the Delp IRA "is and has always been self-directed." Thus, the IRA is subject to Delp's control.

Therefore, because the entirety of the funds in the Delp IRA are non-exempt and because the IRA is subject to Delp's control, the court abused its discretion by denying Nu-Way's request for turnover relief. Accordingly, we sustain Nu-Way's seventh issue.

Attorney's Fees

Nu-Way contends in its eighth issue that the court erred by awarding attorney's fees to Delp. Nu-Way contends in its ninth issue that the court erred by directing Nu-Way to pay Delp's attorney's fees directly to his attorneys. Nu-Way contends in its tenth issue that the court erred by failing to offset the attorney's fee award and credit those sums toward Nu-Way's judgment against Delp.

The trial court awarded attorney's fees to Delp after finding that Nu-Way committed a breach of contract (namely, by seeking to collect against the Delp IRA). In the alternative, the trial court awarded attorney's fees under the Declaratory Judgments Act.

We have determined that the Delp IRA is not exempt from creditors. Therefore, Nu-Way did not "breach" the bankruptcy plan by seeking to enforce its judgment against assets held in the

IRA, and Delp is not entitled to attorney's fees under a breach-of-contract theory. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (party must prevail on contract claim to recover attorney's fees); *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 564 (Tex. App.–Texarkana 2003, pet. denied) (same); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997) (providing for award of attorney's fees in suit on contract).

However, a party need not prevail on a claim for declaratory relief to recover attorney's fees. *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Apex Fin. Corp. v. Garza*, 155 S.W.3d 230, 238 (Tex. App.–Dallas 2004, pet. denied); *Nat'l Café Servs., Ltd. v. Podaras*, 148 S.W.3d 194, 198 (Tex. App.–Waco 2004, pet. denied). Nevertheless, because we have concluded that Delp should not prevail on the merits, we will remand this cause to the trial court to reconsider the attorney's fee award. *See Nat'l Café Servs.*, 148 S.W.3d at 198. Thus, we sustain Nu-Way's eighth issue.

Even though we will remand for reconsideration of the attorney's fee award, we also address the remaining issues because they are likely to arise on remand. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81(Tex.1997); *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 780 (Tex. App.–San Antonio 2004, pet. denied); *In re J.B.*, 93 S.W.3d 609, 617 (Tex. App.–Waco 2002, pet. denied).

The trial court purportedly followed federal law by directing Nu-Way to pay the attorney's fee award directly to Delp's attorneys. However, the attorney's fee award is governed solely by state law. Texas courts have consistently condemned the award of attorney's fees directly to counsel. *See, e.g., Fort Bend County v. Martin-Simon*, 177 S.W.3d 479, 486 (Tex. App.–Houston [1st Dist.] 2005, no pet.); *Graco, Inc. v. CRC, Inc. of Tex.*, 47 S.W.3d 742, 746-47 (Tex. App.–Dallas 2001, pet. denied); *Transp. Ins.*

Co. v. Franco, 821 S.W.2d 751, 755 (Tex. App.–Amarillo 1992, writ denied).

Nevertheless, it has also been held that a party who has been ordered to pay attorney's fees in this manner does not have standing to challenge this aspect of the attorney's fee award. *See Martin-Simon*, 177 S.W.3d at 486; *Transp. Ins. Co.*, 821 S.W.2d at 755. This is because it is usually "immaterial" to the party paying the attorney's fee award how those fees are handled by the prevailing party. *See Transp. Ins. Co.*, 821 S.W.2d at 755. Here however, because Nu-Way is a judgment creditor of Delp, the manner in which the attorney's fee award is handled is a matter of legitimate concern to Nu-Way. Thus, we conclude that Nu-Way has standing to challenge the manner in which the trial court ordered that the attorney's fees be paid. *Cf. Fort Bend County*, 177 S.W.3d at 486; *Transp. Ins. Co.*, 821 S.W.2d at 755.

The court erred when it ordered Nu-Way to pay Delp's attorney's fees directly to his attorneys. *See Martin-Simon*, 177 S.W.3d at 486; *Graco*, 47 S.W.3d at 746-47; *Transp. Ins. Co.*, 821 S.W.2d at 755. Accordingly, we sustain Nu-Way's ninth issue.

A set-off is required when parties hold mutual judgments against each other. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995); *Beutel v. Dallas County Flood Control Dist.*, 916 S.W.2d 685, 693 (Tex. App.–Waco 1996, writ denied); *Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 902-03 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) Here, the parties have stipulated that Nu-Way holds a valid, unpaid judgment against Delp. Thus, the court erred by denying Nu-Way's request that its judgment against Delp be set off against the attorney's fees awarded in Delp's favor. *See Building Concepts*, 667 S.W.2d at 902-03. Accordingly, we sustain Nu-Way's tenth issue.

Conclusion

The court erred by rendering judgment in Delp's favor for

breach of contract and by rendering judgment that Nu-Way take nothing on its claims. The court also erred by ordering Nu-Way to pay Delp's attorney's fees directly to his attorney and by denying Nu-Way's request that its judgment against Delp be set off against the attorney's fees awarded in Delp's favor. Accordingly, we reverse the judgment and remand this cause to the trial court for further proceedings consistent with this opinion.

FELIPE REYNA
Justice

Before Chief Justice Gray,
Justice Vance, and
Justice Reyna
(Chief Justice Gray concurring)
Reversed and remanded
Opinion delivered and filed September 6, 2006

IN THE
TENTH COURT OF APPEALS

No. 10-05-00065-CV

NU-WAY ENERGY CORPORATION,
Appellant

v.

BILLY R. DELP, JR.,
Appellee

From the 96th District Court
Tarrant County, Texas

Trial Court No. 96-183839-00

CONCURRING OPINION

This concurring opinion will address (1) those portions of the majority opinion which are unnecessary and therefore do not constitute binding authority of this Court, and (2) those portions of the opinion that are simply erroneous but do not impact the ultimate result of the judgment. It will then comment on some other matters in the majority opinion before I conclude, concurring only in the Court's judgment.

PURE DICTA

The entirety of the section "Exempt Status of IRA Under Bankruptcy Plan" in the majority opinion is pure dicta. It is dicta because it is completely unnecessary to the disposition of the appeal and, thus, no holding relies upon it for the effect of the judgment. The reason this section is unnecessary to the disposition of the appeal is because, for the majority opinion, the section "Exempt Status of IRA Under Internal Revenue Code" is the section which actually answers the question of whether or not the assets held by the IRA are exempted. Accordingly, this entire section should be omitted from the majority opinion and no reliance should be put upon it by those who come after us.

ERRONEOUS STATEMENTS

Within the section "Exempt Status of IRA Under Bankruptcy Plan" there are various erroneous statements and this section, thus, reaches an unsupportable result. The majority cites *Leibman v. Grand*, 981 S.W.2d 426, 435 (Tex. App.–El Paso 1998, no pet.) with a parenthetical noting "Texas law does 'not provide an exemption for currency, checks, or negotiable

instruments.'" The linchpin of this section, which is based upon this authority, is the statement "It is undisputed that the secured claim would not have been an exempt asset if Delp had acquired it before filing the bankruptcy petition." This statement is not only wrong because the issue is not undisputed; the law is, in fact, contrary to the inference being made by the majority. Of course, the statement is true of anything that is not exempt, but the statement of the majority, in the literal sense of its truth, is totally irrelevant. The question, if necessary to be asked in any context at all, would be: "Would the secured claim [the note] have been an exempt asset if Delp's *IRA* had acquired it before filing the bankruptcy petition?" If the asset is owned by an IRA, and the IRA is exempt, the asset owned by the IRA is exempt. And an IRA can, under normal circumstances, own negotiable instruments such as the note.

The majority's error in this regard cascades down to a holding that the purchase of an asset which would not be exempt for the individual, Delp, with exempt assets from an IRA subjects the newly acquired "non-exempt" asset to seizure/turnover. I could readily distinguish the cases cited by the majority to back into this position, but there is no constructive purpose to be accomplished by doing so.

The IRA apparently had cash to purchase the note. The cash was exempt because it was cash in the IRA, not Delp's cash. But under the majority's theory, the cash, before the purchase, could not have been an exempt asset under Texas law. This is because they attribute the same rules regarding what can be owned by an exempt asset, the IRA, as they do to what assets cannot be exempt if owned by the individual debtor, Delp. Under the majority's theory, any "currency, checks, or negotiable instruments," held by an IRA would be a non-exempt asset of the bankruptcy debtor. This is simply not the law.

The dicta of the majority should be frightening to anyone who owns an IRA. What it essentially means is that if the assets

within an IRA contain or change from one form of currency, check, or negotiable instrument to another form of currency, check or negotiable instrument still owned by the IRA, the assets have nevertheless lost their exempt status in a bankruptcy proceeding. But the truth is that just because the assets within the IRA plan change from one form, like cash, to another form, like stock, the exempt character of the asset does not change. This is because the exempt asset is the IRA, not the individual instruments within the IRA. There has to be some action or transaction other than the ownership or purchase of the type assets we normally expect IRAs to own that causes an IRA to lose its exempt status.

PROHIBITED TRANSACTIONS

The majority discusses two prohibited transactions. The first is whether or not a measurable benefit received by a guarantor of debt due to a transaction involving an IRA is a prohibited transaction. The second is the question of whether or not the payment of attorney's fees from the IRA assets is a prohibited transaction. I will discuss only the second.

In footnote 6, the majority concludes that Delp has engaged in a prohibited transaction by having paid the attorney's fees in defense of the IRA corpus against Nu-Way's efforts to have their lien asserted against them. For this proposition, they cite *O'Malley v. Commissioner*, 972 F.2d 150, 153 (7th Cir. 1992). The attorney's fees paid in *O'Malley* that were determined to be a prohibited transaction were not payments made to defend and protect the IRA's exempt status. The attorney's fees paid were owed by a disqualified person and the payment using IRA funds was, therefore, a prohibited transaction leading to defeating the IRA status of the entire fund. In this case, however, the payments were made to an attorney for the express purpose of defending and protecting the IRA's exempt status. Payment of attorney's fees out of the IRA for the defense of the IRA exempt status is entirely appropriate. If the majority's view is the law, an IRA could never protect itself from creditors and all defense of the IRA would have

to be paid by the owner of the IRA which assumes they would be able to pay for it out of their other assets.

OTHER QUESTIONS

Because, according to the majority, the IRA did not exist at the time the bankruptcy plan was confirmed, but it is undisputed that over a million dollars in assets in the IRA's name did exist, there are some interesting issues raised that no one has addressed.

1. How will the IRS's (that is all taxpayer's) claim for taxes and penalty on the premature distribution of the IRA be collected?

2. Does Nu-Way even have standing to assert a violation of the Tax Code in the management, operation, and transactions within an IRA?

3. Does a state court have jurisdiction to resolve questions about the continued vitality of an IRA or are these claims preempted under ERISA?

STANDARD OF REVIEW

The standard of review in this case is not a de novo determination on stipulated facts as stated by the majority. This was a trial before the court. Some facts were stipulated. But the parties also submitted depositions, affidavits, and numerous exhibits. No live testimony was received. The trial court was, nevertheless, required to make some factual determinations and did so in extensive findings of fact.

This causes me to ask an additional question: Has the majority improperly ignored the trial court's findings or implied findings in support of the judgment?

CONCURRING IN THE JUDGMENT

This case, due to its complexity as exhibited by the presence of a half dozen briefs as well as the submission of other legal authorities, has consumed an inordinate amount of my time. It involves areas of the law that state courts do not deal with frequently. I have studied the briefs and authorities provided by both parties as well as the majority opinion. While I have real concerns over many of the statements, findings, holdings, and conclusions in the majority opinion, I, nevertheless, have concluded from my independent analysis that the result the majority has reached is a proper one under the law and the facts of this case. To document this, I could further delay the disposition of this appeal by writing a detailed concurring opinion. That would be my preference, and I would do so if I had more time and other resources. But I do not have that luxury, so I will simply conclude by stating that, although I cannot join the majority opinion for the reasons stated and others, I do, nevertheless, concur in the Court's judgment.

TOM GRAY
Chief Justice

Concurring opinion delivered and filed September 6, 2006

3 *Billy R. Delp, Jr. v. Nu-Way Energy Corporation*, No. 06-0916 (Tex. 02/02/07) (Denial of Petition) (Reported at 2007 Tex. LEXIS 108)

and

4 *Billy R. Delp, Jr. v. Nu-Way Energy Corporation*, No. 06-0916 (Tex. 04/27/07) (Denial of Rehearing) (Reported at 2007 Tex. LEXIS 391):

IN THE SUPREME COURT OF TEXAS

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NO. 06-0916	§	
	§	**Tarrant County,**
BILLY R. DELP, JR.	§	
v.	§	**10th District.**
NU-WAY ENERGY	§	
CORPORATION	§	

February 2, 2007

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

April 27, 2007

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

★★★★★★★★★★

I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above and attached is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, BILLY R. DELP, JR., pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 30th day of April, 2007.

/s/Blake A. Hawthorn
Blake A. Hawthorn, Clerk

By Kathy Sandoval, Deputy Clerk

5 *Nu-Way Energy Corporation and Economy Oil Company, Plaintiffs, v. Billy R. Delp, Jr., Defendant,* Cause No. 96-183839-00, 96th Judicial District Tarrant County, Texas (December 8, 2004) (Trial Court Amended Final Judgment):

CAUSE NO. 96-183839-00

NU-WAY ENERGY CORPORATION and ECONOMY OIL COMPANY,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	
BILLY R. DELP, JR.	§	
Defendant.	§	
NU-WAY ENERGY CORPORATION, Garnishor/Plaintiff,	§	96TH JUDICIAL DISTRICT
v.	§	
ECONOMY OIL COMPANY	§	
Garnishee/Defendant,	§	
v.	§	
BILLY R. DELP, JR.	§	
Defendant.	§	TARRANT COUNTY, TEXAS

AMENDED FINAL JUDGMENT

This Cause came on for trial on April 5, 2004. At that time, Counsel for all parties stipulated and agreed on the Record to submit the Cause on Stipulated Facts (the "Amended Joint Stipulations of Facts by the Parties"), written submissions, and documentary evidence. Subsequently, final arguments were had on April 19, 2004. At that time, the case was fully submitted to the Court, except as to attorneys' fees, which the parties stipulated would only be submitted for consideration following the Court's ruling on the merits of the case. Amended Stipulated Fact ¶ 28. Following this Court's letter ruling on the merits, submissions were made on attorneys' fees as well. Thereafter, on a motion to amend or for new trial by NU-WAY ENERGY CORPORATION and ECONOMY OIL COMPANY, the Court granted the motion to amend in part, denied the motion in part, and denied the motion for new trial. Accordingly, the Court now **FINDS, RULES, DECLARES, ADJUDGES, AND DECREES** as follows:

1. NU-WAY ENERGY CORPORATION ("Nu-Way") **TAKES NOTHING** as to any of its claims, including both as to turnover and garnishment. Specifically, but without limitation, it is hereby **DECLARED** that Nu-Way has **no interest** in the assets in the Registry of the Court, 342nd Judicial District Court, Tarrant County, Texas, Cause No. 342-153149-94 (the "*Economy* case").

2. No relief shall be had against ECONOMY OIL COMPANY ("Economy"), which is hereby **DISCHARGED** from any garnishment obligation to Nu-Way, and the Writ of Garnishment also is hereby **DISCHARGED**.

3. BILLY R. DELP, JR. ("Delp") prevails on his claims for breach of contract and declaratory judgment. In particularly, the Court **DECLARES**:

a. The assets in the Registry of the Court for the 342nd Judicial District Court, Tarrant County, Texas, in Cause No. 342-153149-94 (the "*Economy* case")– those being (i) the Judgment claim therein against Economy in the amount of **THREE HUNDRED FIFTY THOUSAND DOLLARS AND 00/100 CENTS ($350,000)**, together with (ii) post-Judgment interest thereon at **TEN PERCENT (10%)** per annum compounded annually from the date of that Judgment, as secured by (iii) the Certificate of 175,000 Units of FFP PARTNERS, L.P. ("FFP"), with (iv) all proceeds therefrom (the "Registry Assets")–belong to BILLY R. DELP, JR., INDIVIDUAL RETIREMENT ACCOUNT ("Delp IRA"), as distinct from Delp Individually;

b. Whether those Registry Assets belong to Delp *or* Delp IRA, they are exempt property from any claim of Nu-Way, including all traceable proceeds of such exempt property, held by Delp during his earlier Chapter 11 bankruptcy, whether (i) at its institution, or (ii) when the Chapter 11 Plan ("bankruptcy plan") in that case was confirmed;

c. Therefore, Nu-Way has no claim against or interest in the Registry Assets, either directly or indirectly, through turnover or garnishment or otherwise, whether under its nondischargeable judgment claim from the bankruptcy court against Delp, or on any other basis or for any other reason;

d. Further, Nu-Way is barred by res judicata, collateral estoppel, quasi-estoppel, waiver, settlement and release, and/or contract law from challenging the exempt nature of the Registry

Assets of Delp IRA or Delp due to (i) not objecting to Delp's claimed exemptions in his Schedule "C" in his Chapter 11 bankruptcy, (ii) the confirmation of the bankruptcy plan therein, and/or (iii) the recognition of Delp IRA as an extant entity expressly granted a Judgment award in the *Economy* case Judgment (which is binding on Nu-Way due to its privity with Economy, an opposing party in that case);

e. Nu-Way agreed in Amended Stipulated Fact 1, and its Counsel also admitted in oral argument in the prior appeal in this Cause–see Delp Exhibit 44, Affidavit of Judy Stephenson, Exhibit "A," at page 12 ("We know how it was formed, it was proper as originally constituted.")–that Delp IRA was exempt when it was created, and the Court so rules. The Court holds Nu-Way has failed to meet its burden to establish that Delp IRA lost its exemption at any time thereafter. Regardless, Delp's claim to the Registry assets, even absent Delp IRA's exempt status, and even absent juridical distinctness between Delp and Delp IRA, is nevertheless exempt *from Nu-Way* under bankruptcy law, as aforesaid;

f. Because Delp has pled for breach of contract, and further has pled for declaratory relief, and has, as hereinabove established, prevailed on both, and/or further has proved violation of the Chapter 11 Plan in Delp's bankruptcy case through Nu-Way's attempting collection against Delp IRA on Nu-Way's prepetition debt under bankruptcy law, the Court awards Delp attorneys' fees of **THREE HUNDRED EIGHTY-FOUR THOUSAND, FOUR HUNDRED SIXTY-TWO DOLLARS AND 50/100 CENTS ($384,462.50)** for trial,

together with **FORTY THOUSAND DOLLARS AND 00/100 CENTS ($40,000.00)** in the event of any appeal to the Court of Appeals, together with **TWENTY THOUSAND DOLLARS AND 00/100 ($20,000.00)** in the event of any petition for review to the Texas Supreme Court, together with **TWENTY-FIVE THOUSAND DOLLARS AND 00/100 CENTS ($25,000.00)** in the event the Texas Supreme Court grants the petition, and further the fee of **ONE THOUSAND FOUR HUNDRED SIXTY-TWO DOLLARS AND 50/100 CENTS ($1,462.50)** for the trial work of Bourland, Kirkman, Seidler, Jay & Michel, L.L.P., these being amounts the Court finds reasonable and necessary for Delp to establish his contract claim, and/or alternatively is the appropriate amount for Delp to be awarded under the equities of the case respecting declaratory relief (notably, Nu-Way also requested declaratory relief and attorneys' fees in its pleadings), and/or being relief made available to Delp under bankruptcy law for Nu-Way's violation of the Chapter 11 Plan, as aforesaid.

g. The Court hereby **ORDERS** that payment of the foregoing attorneys' fee award shall be made directly to Delp's Counsel, the law firm of Whitaker, Chalk, Swindle & Sawyer, L.L.P., pursuant to the authorities of *Marre v. HP-84 Nursery Associates, Inc.*, 117 F.3d 297, 303-308; 97-2 U.S. Tax Cas. (CCH) P50,573; 80 A.F.T.R.2d (RIA) 5523 (5th Cir. 1997); *Newman v. Link*, 889 S.W.2d 288 (Tex. 1994); and/or *Hadnot v. Wenco Distributors*, 961 S.W.2d 232; 1997 Tex. App. LEXIS 1879 at *20-21 (Tex. App.–Houston [1st Dist.] 1997, pet. denied) (published in part).

h. Finally, the attorneys' fees awarded are for proof of the breaches of the Plan and the recovery of affirmative relief (including the foregoing declarations) based thereon. These numbers are the same as the damages Delp has incurred due to those breaches of the Plan by Nu-Way, as imposed on Delp in attempting to avoid these ongoing breaches of the Plan by Nu-Way. Therefore, to avoid, *inter alia*, any prospect of duplicative recovery, **IT IS HEREBY DECREED** that Delp alternatively recover the sums set forth in subparagraph 3.f. hereinabove as his damages proximately resulting from Nu-Way's breaches of the Plan, to whatever extent that it be determined Delp is not entitled to recover those sums as an award of attorneys' fees under Chapters 37 &/or 38, Texas Civil Practice & Remedies Code.

4. Judgment interest will run upon the total amount of this Judgment award at the rate of **FIVE PERCENT (5%) PER ANNUM** from the date hereof.

5. The Court simultaneously herewith also enters its Amended Findings of Fact and Conclusions of Law in this Cause, and hereby incorporates same herein by this reference herein to the same extent as if set forth verbatim. To the extent of any conflict, the terms of this Amended Final Judgment prevail.

6. All relief requested in this Cause which has not been granted hereinabove or in the Amended Findings of Fact or Conclusions of Law entered concurrently herewith (insofar as they are not inconsistent with this Amended Judgment) is hereby **DENIED WITH PREJUDICE**.

7. This Amended Final Judgment is the Final Judgment in this Cause on all issues and claims and as to all the parties.

SIGNED this 8th day of December, 2004.

/s/Jeff Walker
THE HONORABLE JEFF WALKER
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

/s/Thomas F. Harkins, Jr.
MACK ED SWINDLE
THOMAS F. HARKINS, JR.
Attorney for Delp

APPROVED AS TO FORM ONLY:

/s/Stefanie Martin Klein
FRANK HILL
STEFANIE MARTIN KLEIN
Attorney for Nu-Way

APPROVED AS TO FORM ONLY:

DON HERRMANN
BART RUE

6 *Nu-Way Energy Corporation and Economy Oil Company, Plaintiffs, v. Billy R. Delp, Jr., Defendant*, Cause No. 96-183839-00, 96th Judicial District Tarrant County, Texas (December 8, 2004) (Trial Court Amended Findings of Fact & Conclusions of Law):

CAUSE NO. 96-183839-00

NU-WAY ENERGY CORPORATION,	§	IN THE DISTRICT
	§	COURT
Garnishor/Plaintiff	§	
	§	
v.	§	
	§	
ECONOMY OIL COMPANY,	§	TARRANT COUNTY,
	§	TEXAS
Garnishee/Defendant,	§	
	§	
BILLY R. DELP, JR.	§	
	§	
Defendant	§	96th JUDICIAL
	§	DISTRICT

AMENDED FINDINGS OF FACT & CONCLUSIONS OF LAW

INTRODUCTION

The Court simultaneously herewith enters its Amended Final Judgment. The bases of that Judgment award are hereby set forth and are incorporated by this reference into that Judgment. However, to whatever extent there may be any conflict, the terms of the Amended Final Judgment prevail.

In light of the length and complexity of the case, facts, and issues, the Court sets out the following Table of Contents for the organization of these Amended Findings and Conclusions.

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CAUSE NO.96-183839-00

NU-WAY ENERGY CORPORATION,	§	IN THE DISTRICT
	§	COURT
v.	§	
ECONOMY OIL COMPANY,	§	TARRANT COUNTY,

	§	TEXAS
Garnishee/Plaintiff,	§	
	§	
BILLY R. DELP, JR.	§	
Defendant	§	96th JUDICIAL
	§	DISTRICT

FINDINGS OF FACT & CONCLUSIONS OF LAW

FINDINGS OF FACT

A. **Historical Setting.**

1. Delp acquired an Individual Retirement Account ("Delp IRA"), as a rollover from his company benefit plan, at a date substantially prior to November, 1991.

2. This Delp IRA was exempt from collection at the time of its creation.

3. Due to business problems, Delp became obliged to seek Chapter 11 bankruptcy relief in November 1991.

4. Delp filed several instruments when he filed that bankruptcy, including a Schedule "C" listing exempt assets. Delp IRA, then held by Texas Commerce Bank as Trustee, was listed in the Schedule "C" as exempt, then valued at $1,118,138.00.

5. No creditor nor any other person with an interest filed any objections to Delp's Schedule "C" listed exemptions in that Chapter 11 case.

6. NU-WAY ENERGY CORPORATION ("Nu-Way"), Plaintiff and Garnishor in this case, was one of the companies previously held in common between Delp and JOHN H. HARVISON ("Harvison"). ECONOMY OIL COMPANY ("Economy") was also.

7. Harvison for some years has been and continues to be now a primary principal of Economy and Nu-Way, as he also is of their parent limited partnership, FFP Partners, L.P. ("FFP").

8. Harvison, Nu-Way, Economy, and FFP were previously, and continue to be until the present, represented by the Hill Gilstrap law firm since at least 1991. Their joint representation evidences privity between Nu-Way, Economy, and FFP. They are in privity.

9. Nu-Way filed proofs of claim in Delp's Chapter 11 case for prepetition debts.

10. Harvison and another associated company submitted a Fourth Amended Plan ("Plan" or "Harvison Plan") for Delp's Chapter 11 bankruptcy. They solicited this Plan. That Plan was confirmed.

11. The Harvison Plan, as confirmed, includes this express provision:

> **4.10** Class 10 consists of the interest of the Debtor ... and is impaired under Harvison's Plan. The Debtor . . . shall be entitled to retain [his] homestead . . . and [his] personal property scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities.

12. The properties Nu-Way now seeks to collect against are [1] a secured claim and [2] its collateral, Nu-Way's characterizations of its claims notwithstanding. They are in the Registry of the Court in another action, referenced by the parties as the "*Economy*" case (Cause No. 342-153149-94, before the 342nd District Court, Tarrant County, Texas).

13. Nu-Way contends that, in spite of ¶ 4.10 of the Plan, Delp IRA and its contents are *not* "exempt" from efforts by

Nu-Way to collect on Nu-Way's prepetition debt.

14. Delp says these properties *are* exempt because they can be traced back to assets in Delp IRA, either at the time (a) his Chapter 11 bankruptcy was filed, or (b) the Harvison Plan was confirmed.

B. **Chronology of the Acquisition of the Security Interest and the Prior Litigation Resulting Therefrom.**

15. After Delp's bankruptcy began, FAMCO, a creditor of Economy, sold some non-performing debt properties to a company referenced by the parties as "FFRE." FFRE has no connection with the parties or the suit. Included in the package was a debt of Economy to FAMCO ("Economy debt"). This preceded confirmation of the Harvison Plan.

16. On December 18, 1992, Delp entered into a contract for purchase with FFRE for the Economy debt for $300,000. FFRE did not acquire title to the Economy debt until December 30, 1992, by bulk sale. At the closing, that same day, Delp *IRA* purchased the Economy *secured* debt package for $250,000. Included in this secured portfolio were a note by Economy for $350,000, a certificate for 175,000 FFP Units, and Delp's guarantee of the underlying debt. At the same time, Consolidated "C" Stores, owned by Delp's son, purchased the *unsecured* debt, consisting of a note for $660,000, for $50,000.

17. At that time, Delp believed Delp IRA purchased the FFP Units outright.

18. Thereafter, the Trustee for Delp IRA, believing Delp IRA owned the Units, sent the certificate for those Units to FFP to be re-issued in the name of the purchaser, Delp IRA, and then returned.

19. FFP did not do what the Trustee requested.

Instead, it instituted an interpleader action (the *Economy* case). During the course of that case, the FFP Units in question, and thereafter their subsequent proceeds, were deposited into the Registry of that *Economy* Court (the 342nd District Court). The parties' later agreed that the Registry retention of the FFP Units and other related items would stay in place until the various parties' interests in the Units in that case could be adjudicated, and then be disbursed.

20. In the Judgment in that case ("*Economy* Judgment"), Economy was adjudged the owner of the Units. However, the Court also rendered judgment that Delp *IRA* owned a claim for $350,000 secured by the Units aforesaid, plus interest. This Judgment resolved whether Delp IRA obtained (a) the Units, or (b) a security interest, in the FFRE transaction.

21. By subsequent consent, the *Economy* Registry continued to hold the secured claim, the FFP Units, proceeds, and related items until full disposition of any appeals.

22. All of those appeals, i.e., in the *Economy* case, have been completed.

23. Nevertheless, Economy has not paid any portion of the $350,000 Judgment.

24. The *Economy* Judgment specifically addressed this contingency. In such event, the *Economy* Judgment ordered, the Registry assets would be distributed to Delp *IRA* for foreclosure to satisfy its $350,000 plus interest secured claim.

25. Delp has requested this distribution from the *Economy* Court following the completion of all the *Economy* appeals. As yet, that distribution has not occurred.

26. This litigation began when Nu-Way sought turnover of Delp's appellate interest in the *Economy* case. Nu-

Way's filing this turnover case is evidence of privity between Nu-Way and Economy.

27. Thereafter, summary judgment was granted to Delp in this turnover case.

28. Nu-Way appealed.

29. The *Economy* appeals concluded.

30. Thereupon, as noted above, Delp/Delp IRA sought disbursement of the Registry assets in keeping with the Judgment.

31. Nu-Way instituted a *garnishment* action with Economy as a friendly garnishee. That case was at one time moved to the 342nd District Court, Tarrant County.

32. The net effect of the relief Nu-Way sought in its garnishment case was the same as that which Nu-Way had *already* sought in its turnover case–that Delp's claim (although it is actually Delp *IRA*'s claim, in fact) against Economy should be turned over to Nu-Way. This further corroborates the privity between Nu-Way and Economy.

33. Ultimately the Court of Appeals in the turnover case concluded fact issues existed as to turnover relief, warranting resolution of those issues by trial by this Court.

34. After lengthy proceedings in the garnishment case over the proper forum, that garnishment case was transferred to this Court for consolidated trial and judgment.

C. **Facts Showing Privity**.

35. The Court has already referenced a number of facts relating to privity. Those and further additional facts amply prove up privity, including, summarily, at least these:

a. Harvison is a primary principal of Nu-Way, Economy, and FFP.

b. Hill Gilstrap, and specifically Frank Hill and Stefanie Klein, have represented Harvison, FFP, Nu-Way, and Economy on an ongoing basis since at least 1991, including Nu-Way herein and Economy in the *Economy* case.

c. Ms. Klein prepared and filed Nu-Way's proofs of claim in Delp's Chapter 11.

d. Hill Gilstrap helped draft Chapter 11 Plans for Delp's bankruptcy on behalf of Harvison and his companies, including the Fourth Amended Plan which was confirmed.

e. The Hill Gilstrap firm concurrently represents Economy in the *Economy* case (post judgment), and also Nu-Way in its turnover and garnishment cases.

36. Therefore, Harvison, Economy, Nu-Way, and FFP are all in privity with one another for all purposes in this litigation.

D. **Substantive Facts**.

37. The Court finds that the resolution of Delp's claims precludes the necessity for addressing any claims of Nu-Way independently thereof.

38. Nu-Way obtained a Judgment against Delp in his Chapter 11 bankruptcy.

39. That Judgment was predicated entirely on Nu-Way's proofs of claim therein.

40. Prior to this case, an action was held in the 342nd Judicial District, Tarrant Count involving FFP Partners, Economy, Harvison, Delp IRA, and Delp.

41 Trial was had over the parties' respective rights in 175,000 Units of FFP.

42. Delp IRA appeared through Central Bank and Trust, its then-Trustee.

43. Economy later dismissed the Trustee via a Notice of Non-Suit.

44. At no time in that *Economy* litigation, lasting a number of years, did Economy, FFP, or Harvison raise any complaint as to the following facts, or legal assessments from such facts, regarding: [a] Delp IRA's *existence*, [b] Delp IRA's *capacity* to be a party, [c] its *being* a party, [d] the propriety of its *representative* being *Delp*, or [e] the Judgment *running to* Delp *IRA*, instead of to Delp; particularly insofar as Delp *IRA* was the proper and particular entity Economy was going to pay under the Judgment, by its own terms.

45. In fact, Economy neither filed nor advanced *anything* as a challenge to the *Economy* Judgment in *any* respect, except denial of attorneys' fees.

46. The terms of the ultimate Judgment in that *Economy* lawsuit provided that Economy owed $350,000, plus post-Judgment interest, to Delp *IRA* on its security interest, which was not challenged by Economy or its Counsel in the appeal of that case.

47. According to the *Economy* Judgment, if Economy did not pay Delp IRA the Judgment, the Registry would be disbursed to Delp IRA for payment of the Judgment debt.

48. Economy signed off on that Judgment as to form.

49. All appeals in the *Economy* lawsuit have been resolved, and the Judgment is final for all purposes, except as to disposition of the Registry assets, as aforesaid.

50. Economy has not paid or tendered any part of its obligation under that Judgment to Delp IRA.

E. **Adoption Clause**.

51. All Findings of Fact hereinabove which constitute Conclusions of Law are hereby adopted as such.

CONCLUSIONS OF LAW

A. **Jurisdiction & Venue**.

1. The Court has jurisdiction of subject matter and person, and venue is proper.

B. **Key Historical Events**.

2. Nu-Way's Judgment *claims* arose before Delp's Chapter 11 Bankruptcy filing.

3. During Delp's Chapter 11 bankruptcy, John Harvison, leading principal of Nu-Way and Economy, advanced a Fourth Amended Plan of Reorganization ("Plan"). It was confirmed. Its terms bound and bind Delp's then-creditors; *e.g.*, Nu-Way, from thenceforth.

4. This confirmed Plan, as successfully advanced by Harvison, provides:

> **4.10** Class 10 consists of the interest of the Debtor ... and is impaired under Harvison's

> Plan. The Debtor . . . shall be entitled to retain [his] homestead . . . and [his] personal property scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities.

5. Schedule C provides that the "Individual Retirement Account at TexasCommBank, Fort Worth (rollover)" is an exempt asset. This is the asset from which Nu-Way now seeks to collect on its bankruptcy judgment against Delp.

6. Nu-Way agreed, per the Plan, Delp would be entitled to "retain" the IRA from collection efforts on creditor claims such as what Nu-Way advanced in Delp's bankruptcy and obtained Judgment on (the Judgment Nu-Way now seeks to collect on in this case).

C. **Nu-Way is Precluded from Claiming that Delp IRA Lost Its Exemption Insofar as Concerns Any and All Further Collection Efforts by Nu-Way.**

1. Res Judicata.

7. Because [a] the Scheduled Exemption, [b] the Plan, and [c] Nu-Way's Judgment here sought to be enforced all took place in federal court, this Court follows the federal law of res judicata. Particularly, insofar as this case rests on the Exemption and the Harvison Plan, federal *bankruptcy* law determines the preclusive effect of each.

8. Under *federal bankruptcy law*, a final judgment precludes the parties or their privies from relitigating issues that were or could have been raised in the first action. The elements are: (a) a final judgment on the merits, (b) sufficient identity between the causes of action asserted in the earlier and later suits, and (c) sufficient identity between the parties in the two actions.

9. Actual knowledge of a claim is not a requirement

for application of res judicata. It is the existence of the claim, not party-awareness of it, that controls.

10. An order of confirmation of a bankruptcy plan is a "final judgment" under bankruptcy law. As well, a failure to object to a listed exemption, being a ruling subject to the right of appeal, is a "final judgment." Both rulings satisfy res judicata's element one.

11. Element two, having the *same issue* in both cases, is satisfied in the common question whether Delp IRA is exempt from Nu-Way collection efforts.

12. Element three, the identity of the parties, is demonstrated simply by the styles of these cases being expressly "*Nu-Way versus Delp*" in each case.

13. Therefore, federal bankruptcy *res judicata law* renders the Plan and the unopposed exemption preclusive of Nu-Way's claims in this litigation. It prevents Nu-Way from (1) challenging the exempt status of Delp IRA; as well as (2) pursuing (a) the funds and assets therein, in addition to (b) all traceable proceeds therefrom thereafter.

14. These assets of Delp IRA are legally free from any Nu-Way post-Plan-confirmation collection efforts against Delp and/or Delp IRA, based on prepetition claims, which are what Nu-Way asserted to obtain the Judgment it now seeks to collect.

15. Under Texas State law, res judicata is also preclusive because of the Judgment entered in the *Economy* lawsuit.

16. Texas res judicata law requires three elements: (a) prior final judgment on the merits; (b) identity of parties or privity; and (c) second action based on the same claims, whether raised or could have been raised before. Persons may be in privity

if they can control an action, or if their interests can be represented by a party to the first litigation.

17. The *Economy* Judgment meets these Texas State res judicata requisites.

18. First, the *Economy* case has a final Judgment. Second, Nu-Way, the Plaintiff instanter, is *in privity* with Economy, the Plaintiff in the *Economy* case. In fact, Nu-Way *joined* Economy as a *co-Plaintiff* in the turnover case. Therefore, Nu-Way's and Economy's interests, as related to whether Delp IRA is subject to collection for Nu-Way's Judgment debt, are not permitted to be adverse to each other under Texas Disciplinary Rule 1.06(a). Third, the ownership rights to the FFP Units was *pivotal* in the *Economy* lawsuit. Therefore, there is every reason why the *Economy* Judgment should control on who has what rights to the Economy secured debt and its proceeds.

19. In fact, the Court notes that the FFRE transaction, delineated in the Findings of Fact *supra*, was the *focal point* of the *Economy* litigation. Economy, Harvison, and FFP, all adverse to Delp, could not have overlooked that Delp IRA was proclaimed the Judgment creditor, nor been ignorant of its effects. The Court gives no credence to any contrary supposition. Indeed, Economy helped draft that Judgment, and agreed to it in form.

20. Economy, and Nu-Way as its privy, cannot challenge Delp IRA's status as juridically distinct from Delp, nor that Delp IRA has continued in existence, at least until the date of the *Economy* Judgment. Nu-Way's expert, Noel Ice, testified and opined explicitly and repeatedly in his prior Court proceedings, deposition, and expert report, that involvement in a "prohibited transaction" would cause Delp IRA to "*cease to exist*" at that very moment. Whereas, per the *Economy* Judgment, the Delp IRA in fact did continue to exist until entry of that *Economy* Judgment, because that Judgment made an affirmative property award to Delp IRA. The FFRE transaction long preceded the *Economy*

Judgment. It is contradictory for Nu-Way to now say the FFRE transaction, in 1992, was a prohibited one under federal tax law, yet simultaneously all Harvison interests acknowledged via the 1998 *Economy* Judgment that Delp IRA "continued to exist" those many years *following* the FFRE transaction. The *Economy* Judgment therefore forecloses the arguments of Mr. Ice that the Delp IRA lost its exempt status in the 1992 exchange.

2. Collateral Estoppel.

21. Due to privity between Economy and Nu-Way, collateral estoppel as well establishes that no "prohibited transaction" occurred in the FFRE transaction.

22. Collateral estoppel under federal and Texas State law has three elements: (a) the facts sought to be binding in the second action were fully and fairly litigated in the first, (b) those facts were essential to the judgment in the prior action, (c) the issue subsequently is identical to an issue in that prior action.

23. Under an alternative formulation, collateral estoppel is held to foreclose relitigation of distinct issues where: (a) the party against whom it is asserted was a party in the former action, or was in privity with a party in the prior action; (b) the issue at stake in the current action is identical to the one involved in the former action; (c) the issue was actually litigated in the former action and (d) the determination of that issue in the former action was a necessary part of the judgment.

24. Whether collateral estoppel is satisfied is determined by examining the pleadings and the evidence in the prior action. The facts and issues relating to ownership of the Economy debt are the same here as in the *Economy* case. The legal issue in both cases turned on the effect of a single factual scenario–the FFRE transaction. "Who owns what?" as a consequence of that exchange was adjudged in the *Economy* case. That Court adjudicated that Delp IRA owned the secured claim as

a result of that deal. This issue will not be readjudicated here, nor could it be.

3. Privity.

25. No general definition of privity exists for all res judicata/collateral estoppel purposes. The circumstances of each case must be examined.

26. Privity connotes those who in law are so connected with a party to a judgment as to have an identity of interest with the party to the judgment, and that prior party is therefore deemed to have represented the same right.

27. To be in privity does not require a party relying on the defense of res judicata, collateral estoppel, or quasi-estoppel to be the alter ego of the party in the initial suit.

28. Nu-Way and Economy are in privity in this case for purposes of all preclusive issues, including res judicata, collateral estoppel, and quasi-estoppel.

29. The primary and sufficient ground establishing this privity is that the same law firm has represented all the Harvison parties over fourteen years, including in this litigation.

30. Hill Gilstrap (including particularly Stefanie Klein) now represent (a) Economy in the *Economy* case (still pending in the judgment-enforcement stage), (b) Nu-Way in the turnover case, and (c) Nu-Way in the garnishment case.

31. This is in addition to Hill Gilstrap and Stefanie Klein representing Harvison, Nu-Way, and other Harvison "associates" or entities in Delp's Chapter 11.

32. Common counsel, and guidance of multiple legal proceedings by that firm in a unified direction, may, and does,

render the Harvison parties (including Economy and Nu-Way) privies to each other.

33. In fact, the genesis of this very turnover suit reconfirms this privity. Nu-Way did not seek some "cash comparable" turnover relief from Delp. Instead, *Nu-Way* wanted Delp/Delp IRA to forfeit their appeal against *Economy*. This makes no sense short of privity.

34. Similarly as to the *garnishment*. When Nu-Way filed that case, it was not then clear how the appeal from the Judgment in this turnover suit would turn out. Nu-Way, however, would not in the meantime allow Delp IRA to receive its distribution from the Registry in the *Economy* case, despite Delp/Delp IRA and Economy's appeals from the Economy case being completed. Without some action, a Harvison entity (Economy) would might have to pay Delp/Delp IRA something. To avoid that, Nu-Way initiated the *garnishment* action. This was the additional means selected by the Harvison group to avoid distribution or payment to Delp or Delp IRA by a Harvison entity.

35. The Court's conclusion as to privity is that whatever Nu-Way is precluded from in advancing in this litigation, Economy is likewise barred from; and if Economy is barred, Nu-Way is likewise bound, as to all issues and facts involved in this lawsuit.

4. Quasi-Estoppel.

36. A party cannot be heard to argue a contrary position to what it earlier successfully advocated in order to then obtain another advantage inconsistent with the first.

37. Nu-Way cannot benefit from some Plan terms, as it did (all other Delp assets were made open to creditor collection, of which Nu-Way was one), yet now fight the efficacy of the single exemption–what was in Delp IRA–allowed by that same

Plan.

5. Settlement & Release.

38. If a settlement arises from a fractured relationship, where each side knows it cannot blindly put trust in the other, then the court will enforce the settlement terms even against charges of fraudulent concealment by silence. While the Court does not conclude that Delp fraudulently concealed anything, nevertheless this Court's Judgment is bolstered by the fact that Harvison et al. had no right to rely on any silence of Delp as to the FFRE transaction during any bankruptcy proceedings, under the specific facts of this case.

6. Waiver.

39. Waiver is the intentional relinquishment of a known right, or an action or omission so inconsistent with a known right as to be deemed an abandonment of that right.

40. Nu-Way had the opportunity to object in Delp's bankruptcy to the exempt nature of the property it now seeks to collect. It could have done so (had it any grounds) when the property was listed in Delp's Schedule "C," as to any impediment it believed existed at that time. It did not. Thereafter, Nu-Way could have objected to Delp's Delp IRA exemption when the Plan, which was ultimately confirmed, drafted by Harvison, allowed for retention of that property by the debtor. It had the right to investigate under Rule 2004, Federal Bankruptcy Rules in order to determine what was in Delp IRA at any time if it had intended to advance any objection to the Harvison Plan respecting that provision. Nevertheless, it gave those rights to investigate and object away. It cannot renew them.

41. This conclusion cannot be gainsaid by the fact that the acquisition of the FFRE secured claim occurred post-Schedule "C." The *proceeds* of Schedule "C" property were exempt from

collection by Nu-Way if those assets were initially exempt, regardless what was purchased with them. Post petition, Nu-Way had every incentive and opportunity to revisit the contents of the Delp IRA assets in light of prospective confirmation proceedings. Yet Nu-Way did nothing. It is therefore in the same situation of litigants generally who do not investigate or who sleep on their rights.

D. **Delp IRA's Exemption Was Effected by Chapter 11 Bankruptcy Proceedings.**

42. A postpetition change in the nature of property whose exemption was effected by a lack of objection to the Debtor's Schedule "C" will not circumvent the proscription against collection on that property by *prepetition creditors*. In this case, this rule applies to Nu-Way's seeking to collect against Delp IRA assets based on its prepetition claims. This bankruptcy law is clear.

43. The parties have stipulated that the claim and security held in the Registry of the *Economy* Court is traceable back to the assets in Delp IRA at the outset of Delp's Chapter 11 case. Therefore, it is Delp IRA that owns the secured claim against Economy.

44. Moreover, subsequent to the Schedule "C" finality, Harvison's Plan was confirmed in Delp's Chapter 11 bankruptcy case. An Order confirming a Plan is binding on the rights and liabilities of all parties, creditor and debtor alike, just as with a final judgment. Moreover, it is equally as binding as a valid contract.

45. Creditors, limited to the rights afforded by the Plan, may not take actions to collect debts inconsistent with, and violative of, the parameters of collection in the Plan.

46. The Plan is unambiguous. It leaves Delp IRA safe

from collection: "The Debtor ... shall be entitled to *retain* [his] homestead ... and ... personal property scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities."

47. Even were there ambiguity, the Plan was drafted by the same counsel that represent both Economy and Nu-Way in these proceedings and the *Economy* case, and that represented Nu-Way in Delp's bankruptcy. Thus, any ambiguity in the terms of the Plan must be construed against the draftsmen of the Plan, not Delp.

48. Texas State law likewise holds that a writing is generally construed most strictly against its author.

49. The only reasonable construction which can be placed on the operative term of the Plan, as affects the parties here, is that Nu-Way could not, cannot, and will not in the future be able to collect against anything which was in the Delp IRA as of the confirmation of the Chapter 11 Plan, or its proceeds. This was drafted by Harvison, and confirmed. The proceeds include the secured claim adjudged to Delp IRA in the 342nd Court Registry.

E. **Nu-Way's Collection Efforts are Barred By Contract (the Chapter 11 Plan).**

50. As stated, in addition to being a judgment, a Chapter 11 Plan in and of itself constitutes a binding and enforceable contract.

51. In this Plan contract, the pertinent contractual language is this:

> 4.10 Class 10 consists of the interest of the Debtor and the Debtor's spouse and is impaired under Harvison's Plan. The Debtor and the Debtor's spouse shall be entitled to retain their homestead . . . and their personal property

scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities.

52. "*Retain*" means: "to keep in possession or use; ... to hold secure or intact; *syn* see KEEP." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster 1987) at 1006.

53. This means: Nu-Way cannot not raid Delp IRA for satisfaction of its prepetition claims against Delp. Instead, Delp was to "*retain*" it free from such efforts.

54. The other key term is "scheduled," which means: "a written or printed list, catalog, or inventory." *Webster's* at 1050. Thus, the Plan refers to what is "written down" under "Schedule C" (the category for listing exemptions) as being what Delp can "retain."

55. No term requires Schedule "C" to be "accurate" or even in "good faith." The Court cannot add to or subtract from the written instrument. If the item was "written down" in Schedule "C," it cannot be "taken away" from Delp by prepetition creditors; here, Nu-Way.

56. Even were there ambiguity in the Plan language, which there is not, still it would have to be construed against Harvison, the drafter, as well as the primary beneficiary, and those in privity with him, including Nu-Way. The Court observes that Nu-Way has no plausible rendering of ¶ 4.10 supporting its contrary position to that stated here. Only one reasonable construction exists: Nu-Way cannot collect from Delp IRA.

57. Under the Plan contract, Nu-Way cannot collect against Delp IRA from its assets on (a) the date of Delp's Chapter 11 Petition; (b) the date of the Plan confirmation, or (c) any date subsequent thereto if traceable thereto. All such assets are exempt from collection by Nu-Way (as well as all other Harvison entities as to their pre-petition claims). All security assets ascribed to

Delp IRA in the *Economy* Judgment which are in the *Economy* Registry are in these categories of either (a), (b), or (c). By the Plan contract's express terms, Nu-Way has no rights to the *Economy* Registry assets, reserved for Delp IRA, (a) per Schedule "C"; (b) per the Plan, and/or (c) per the *Economy* Judgment.

F. **Delp's Right to Recover for Breach of Contract Against Nu-Way.**

58. Nu-Way's attempts to collect from Delp IRA are *breaching* the Plan contract.

59. Delp has been *damaged* by attorneys' fees imposed upon him to defend against Nu-Way invading Delp IRA assets in two successive lawsuits (now consolidated).

60. Delp is further entitled to recover his reasonable and necessary fees incurred in pursuing his claim for breach of the Plan contract in this litigation.

G. **Garnishment Not Available to Nu-Way.**

1. Garnishment Not Available Against Registry of Another Court.

61. Nu-Way's case also fails *procedurally*. As to the garnishment, the relief sought by Nu-Way is unavailable as a matter of law. Assets *in custodies legis*, held in the custody of law, cannot be garnished. This includes most particularly properties held by the clerk of a court.

62. Conversely, garnishment cannot succeed because Economy has no authority or capacity to deliver assets from a Court Registry to Nu-Way. Trial Courts retain authority to enforce their judgments and disburse money held in their registries. The Registry funds remain with the Court, pending disbursement per the Judgment. Economy can do nothing with

them. They cannot be removed by a party to satisfy a garnishment against that party.

2. Grounds for Harsh Garnishment Remedy Not Established.

63. Garnishment is in any event ineffective because Economy has not admitted that it owes Delp a debt, or that it has custody over any Delp assets. If it has no assets of Delp, and owes nothing to Delp, it has nothing to hand over to Nu-Way. Garnishment affords a harsh remedy. It cannot be sustained unless strictly conforming to statutory requirements and applicable rules. Nu-Way has failed to meet this obligation.

64. The only issue in a garnishment action is whether the garnishee is indebted to the judgment debtor, or has in its possession effects belonging to the debtor. This is determined at the time of service of the writ on the garnishee, or at the time of its answer.

65. In its Answer as Garnishee, Economy does not affirmatively state that it is obliged to pay *anything*. It merely "notes" that "there are assets in the Registry subject to distribution." Nu-Way did not traverse this notation. It is therefore bound by it.

3. Application of Rules of Construction to the *Economy* Judgment Defeats Nu-Way's Garnishment.

66. Delp and Delp IRA are separate juridical entities, in the fact that both are treated distinctly under the law for some purposes, the IRA being in the nature of a trust.

67. Delp and Delp IRA are separate juridical entities as further shown and proven up by the *Economy* litigation and its Judgment, in its differing treatments between the two.

68. Economy makes one affirmative representation in its Answer. It says it will accede to whatever the *Economy* Judgment itself provides. That Judgment says: "pay Delp *IRA*." Economy admits a judgment debt but in embracing that obligation it necessarily admits that under that same instrument its debt does not run to *Delp*, but rather to Delp *IRA*.

69. Therefore, there is no debt of Economy to *Delp* which Nu-Way may garnish. Instead, the *Economy* Judgment–the very one which *creates* the debt relationship which Nu-Way now seeks to capitalize on, by garnishment, in the first place–explicitly makes Economy's obligation run to Delp *IRA*:

> (ii) The Delp IRA owns a secured claim for $350,000, with the FFP Units pledged as collateral. . . .
>
> IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED, that the Delp IRA owns a secured claim for $350,000, with the FFP Units, the FFP Market Company Stock, all distributions therefrom, and all interest on said distributions, pledged as collateral.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Delp IRA have judgment against Economy for the sum of $350,000, with post-judgment interest thereon at the rate of ten percent (10%) per annum from the date of the judgment until paid, which post-judgment interest shall be compounded annually.
>
> IT IS FURTHER ORDERED that the judgment of $350,000, with post-judgment interest thereon, if not paid by Economy, shall be paid and satisfied from the FFP Units, their distributions and interest earned from the distributions, all of

which are currently held in the registry of the court, prior to any disbursement therefrom to Economy. [*Economy* Judgment at 2-3.]

70. In construing this *Economy* Judgment, the same rules of interpretation apply to judgments as in ascertaining the meaning of other written instruments.

71. As the foremost canon, all its words are to be taken as deliberately selected for a purpose.

72. Delp and Delp *IRA* are separately and distinctly referenced in the *Economy* Judgment. In all *payment* or *obligee* provisions, only Delp IRA is stated to be the obligee. Not Delp. Not both collectively. Delp himself is only mentioned once–and that specifically, separately, and distinctly from Delp IRA, in another section, dealing with another issue. Clearly, the *Economy* Court meant to differentiate Delp IRA on the one hand from Delp personally on the other hand in the *Economy* Judgment. Clearly, the payment obligations run directly, and only, to Delp IRA.

73. If the point of the *Economy* Judgment had simply been to make adjudications as to *Delp*, then adding Delp "IRA," and making specific provisions as to Delp "IRA," would have been superfluous at best, and confusing or inaccurate at worst. Therefore, the Court concludes the *Economy* Judgment made Economy's payment obligations to run to Delp *IRA* as a separate repository from any other avenue of ownership which might otherwise have been available to Delp (i.e., into any other financial vehicle Delp might elect).

74. Economy does not owe anything to Delp under the *Economy* Judgment. Therefore, attempting to take assets set aside for Delp IRA, due to an obligation of Economy to Delp IRA, as a means of satisfying a wholly distinct obligation ostensibly running from Delp to Nu-Way, cannot succeed.

75. The same end result follows even were Delp IRA *not* juridically distinct, nor having been deemed to be so, from Delp. The Registry asserts are clearly earmarked to go into Delp IRA. Therefore, they cannot be distributed *generally* to Delp, as part of his *undifferentiated estate*, but must be deposited into Delp *IRA*. This is into the very vehicle of ownership this Court has already deemed exempt from Nu-Way's claim under applicable *bankruptcy* law, regardless whether Delp IRA may in any other respect have forfeited its exemption as to other creditors on other debts. Delp IRA's exemption from Nu-Way is not dependent on IRA's independent existence from Delp, nor its tax exempt status. Schedule "C" and the Plan exempt Delp IRA *regardless other distinctions*. Garnishment is **DENIED**.

H. **Turnover Is Denied**.

76. The *turnover* relief requested may not be granted either. It is Delp IRA that has the claim against the assets in the *Economy* Registry. Delp IRA is a juridically distinct entity from Delp. Therefore, its rights as a judgment claimant in the *Economy* case cannot be adjudicated here, certainly not without its joinder in this litigation.

77. Further, the asset Nu-Way seeks to have turned over is the subject of the proceedings in the *Economy* case before a separate Court. This Court cannot order the turnover of assets the subject of litigation in another District Court.

78. In any event, the assets in the *Economy* Registry are exempt from collection by Nu-Way on its prepetition debt claim against Delp upon which its Judgment is based, regardless the distinction between Delp and Delp IRA and regardless whether Delp IRA remains exempt under any other law or for any other purpose. Turnover is **DENIED**.

I. **Nu-Way's Claims & Defenses Rejected**.

79. As to its own claims and defenses, Nu-Way apparently contends that lack of physical possession of the note and collateral by Delp IRA caused lapse of ownership of the security interest. This is incorrect. Delp IRA lost possession of the certificate because FFP failed to return it. It is in the possession of the Registry in the *Economy* Court, where FFP deposited it following its retention. This lack of possession cannot deprive Delp IRA of its ownership interests. A party cannot profit from its own wrong. Nu-Way is in sufficient privity with Economy and FFP to be bound as to the effect of their malfeasance.

80. Under federal bankruptcy law, which controls as to the exemption issues because it is federal bankruptcy law which created these exemptions, it is the party objecting to a debtor's exemptions that has the burden of proving the exemption is improperly claimed. A claimed exemption is presumptively valid. Exemption statutes receive a liberal construction in favor of the debtor to advance the humane purpose of preserving to the unfortunate or improvident debtor or his family the means of obtaining a livelihood and prevent them from becoming a charge upon the public.

81. Exemptions statues are never restricted in their meaning and effect so as to minimize their operation upon the beneficent objects of the statutes, and questions regarding the extent of exemptions are resolved in favor of the one claiming the exemption.

82. Nu-Way argues Delp IRA lost its exemption when it purchased a security interest with the FFP Units as collateral. However, that purchase was from funds exclusively carved out of Delp IRA, made exempt due to Delp's listing it in his Chapter 11 Schedule "C," and receiving no objection to it. Delp IRA's acquisition of the secured interest in the FFP Units therefore became exempt immediately upon its acquisition by Delp IRA funds, insofar as all claims by any prepetition creditors of Delp are

concerned, i.e., Nu-Way.

83. If Nu-Way or Economy is arguing that the fact that the certificate and related instruments for, and proceeds from, the 175,000 Units currently reside in the Registry of the *Economy* Court divests the IRA of the security interest, this is totally unfounded. Delp IRA, and Delp, must abide the dispensation of the Court whose Registry is involved, obviously, until that Court, or an appellate tribunal, may order otherwise. Such compliance by Delp IRA with a court order cannot strip Delp IRA of its security interest.

84. Under the UCC, Texas Business & Commerce Code § 9.313(h) provides that a secured party's delivery of any collateral to a third party does not constitute relinquishment of possession so as to forfeit the security interest where the recipient is "to hold possession of the collateral for the secured party's benefit." *Id.* Here, all the parties to the *Economy* case agreed that the assets would remain in the Court's Registry pending the disposition of the *Economy* litigation, including the appeals. As the adjudicated owner of the security interest in that Judgment Registry, it is obvious that the holding of this collateral in that Registry was, and still is, for Delp IRA's benefit. This fully complies with UCC § 9.313(h). Delp IRA's security interest in the Units and the balance is preserved, despite lack of actual physical possession of any indicia of ownership, or the security status thereof.

85. Likewise under federal bankruptcy law, an interim period of holding exempt assets outside the confines of an exempt vehicle does not defeat that exemption. *Economy's* Registry here is the exemplar of such a permissible arrangement.

86. Moreover, it is not open to Economy–or, in turn, Nu-Way, under privity–to avoid Economy's obligation to make payments to Delp IRA on the ground that the collateral resides in the *Economy* Registry. The Delp IRA security interest assets were

already in that Registry *before* that Court entered its Judgment. Therefore, it is clear that neither the parties nor that Court could possibly have considered the retention of that locale for those assets to serve to defeat the efficacy of the security interest *which that Judgment itself therein awarded.* This reading would obliterate and render superfluous the larger majority of the Judgment, if not its whole effect, and therefore that reading cannot be correct. It is not the correct reading, and this Court does not accept that reading. Neither the prejudgment nor post-judgment holding of the security interests in the Registry of the *Economy* Court operate to divest Delp IRA of its ownership or exemption of that interest.

87. Finally, to the extent Nu-Way claims that some confusion in a Trustee's listing of assets divests Delp IRA of its portion in the *Economy* Registry, this is inefficacious. Instead, a large amount of confusion is entirely understandable, given the past decade of quite litigious litigation over these Units. The Court knows of no theory of ownership lapse by accounting error, and will not create or implement one here.

88. The security interest with the FFP Units as collateral awarded to Delp IRA in the *Economy* Judgment still belongs to Delp IRA. It has not been forfeited.

89. The Court notes that Delp has withdrawn his claim of conversion.

J. **Rulings, Declarations, & Remedies.**

90. Nu-Way breached its contract–the Plan–with Delp, and has thereby foisted off on Delp a tremendous amount of attorneys' fees as a direct, foreseeable consequence.

91. Delp has requested and established a proper and sufficient predicate for declaratory relief. The Court hereby rules that entry of such relief is hereby **GRANTED**, and certain

declarations are therefore set forth hereinbelow, and in the Final Judgment.

92. Delp is entitled to reasonable and necessary attorneys' fees, whether (a) by way of damages, constituting the reasonably foreseeable and proximate result of his reasonable and necessary defense against the wrongful efforts by Nu-Way to collect on its judgment claim against Delp from Delp IRA assets, (b) as Delp's reasonable attorneys' fees incurred in Delp's successful assertion of breach of contract against Nu-Way, and obtaining affirmative relief based thereon; and/or (c) as a matter of equity under the Declaratory Judgment Act.

93. The Court finds that it is no defense to the fee claim whether Delp IRA paid some portion of those fees. It does not disenfranchise Delp's right to have the fees paid that he may have drawn on some particular source to provide for such payment which he was legally obliged to pay. Second, Nu-Way has claimed throughout that there is no distinction between Delp and Delp IRA, so it can hardly be heard to object, as a basis for avoiding the fees, that any fees paid on behalf of Delp came from Delp IRA. Third, that some benefit from the award may inure to Delp IRA is no legal objection to Delp's recovery.

94. The Court also concludes that (a) the attorneys' fees awarded to Delp as damages from Nu-Way's breach of the Plan contract overlap with (b) the attorneys' fees awarded to Delp as the prevailing party on the breach of contract claim. The Court concludes that either ground sufficiently supports that fee recovery, and therefore awards the attorneys' fees alternatively under each, thereby also obviating any duplicative recovery.

95. This leaves the question to whom the fee award will be directed. Various case law suggest several possibilities. Because bankruptcy law in very large measure engenders this action–including as a base for the attorneys' fee award, whether as damages or as a breach of the Plan contract–the Court elects to

follow federal law under the Supremacy Clause of the United States Constitution. That law directs that attorneys' fee awards are to be directed to the real party in interest, the attorneys who successfully advanced the causes which provide relief to their client. It may be that such an award conflicts with the recovery called for under Texas State law. However, this is uncertain. While the Court of Appeals has taken the position that fees are the property of the party and an award can be made only to such a party, the Texas Supreme Court has undermined one of the rationales for those holdings; i.e., the Texas Supreme Court holds an attorney seeking an award of attorneys fees thereby becomes a party to the action. In any event, the Court finds federal bankruptcy law relating to attorneys' fees controls here. Therefore, the fee award of this Court will be directed to be paid to Counsel for Delp, specifically Mack Ed Swindle; Thomas F. Harkins, Jr.; the law firm of Whitaker, Chalk, Swindle & Sawyer, L.L.P.; and the law firm of Bourland, Kirkman, Seidler, Jay & Michel, L.L.P., as more specifically delineated below.

96. To whatever extent the Court of Appeals may determine an award to such beneficiaries is in error, the Court conditionally directs that the fee award be paid to Delp earmarked for deposit in Delp IRA. There is no question but that the fee award in this case is "proceeds" from Delp IRA. The whole dispute in this cause is whether Nu-Way can collect on its debt against Delp from Delp IRA assets. The documentary evidence before the Court demonstrates Delp's invasion of the IRA corpus to defend against his IRA's assets being taken from him. Under no circumstance can Nu-Way be benefitted by such conduct by stripping Delp IRA of the very assets it cannot have by draining the IRA and then claim primacy over the IRA as to the fee award. This would be utterly inequitable.

97. In keeping with this Court's right to direct its award equitably under the Declaratory Judgments Act, and in light of the foregoing, the Court directs that if it be determined that the fee award in the Amended Final Judgment may not run directly to

Counsel for Delp, then the Court directs that the fee be paid to Delp with instructions to replenish the IRA for the funds taken from the IRA to sustain this defensive litigation.

98. Therefore, the fee award is not subject to offset against whatever prepetition debt Delp may owe to Nu-Way. The Court makes this determination, in part, based on federal law made applicable hereto by the bankruptcy underpinnings of this case, as aforesaid. Here, as well, the Court of Appeals could be read as reaching a different result under Texas State law. In addition to the Supremacy Clause consideration, the Court makes clear that this is not simply a case of two persons standing against each other in the same capacity. The Court has held that Nu-Way cannot satisfy its debt against Delp personally through raiding the assets of Delp IRA. The whole thrust of Nu-Way's effort in this case is to raid Delp IRA assets. By determining that Nu-Way has acted wrongfully and in violation of bankruptcy law in so doing, it would be counter-intuitive to give Nu-Way the benefit of the fees it has made Delp incur simply to avoid what Nu-Way is not entitled to do. Thus, the fees Delp has incurred have not been to obtain an affirmative recovery for Delp, but rather to deflect the improper effort of Nu-Way to raid exempt assets. Delp cannot properly be penalized for doing so by having to pay out otherwise exempt assets in defense of those selfsame assets.

99. Further, as to the *amount* of the fees, Nu-Way has dictated that magnitude by continuing to press its improper claims right up until the Amended Final Judgment herein, and with apparent intent to appeal.

100. Accordingly, the fee award herein will not be offset by or against any prepetition debt of Delp to Nu-Way, whether it runs to Counsel, or to Delp to be refunded by Delp to Delp IRA.

101. The Court therefore awards as such fees **THREE HUNDRED EIGHTY-FOUR THOUSAND, FOUR**

HUNDRED SIXTY-TWO DOLLARS AND 50/100 CENTS ($384,462.50) for trial, together with **FORTY THOUSAND DOLLARS AND 00/100 CENTS ($40,000.00)** in the event of any appeal to the Court of Appeals, together with **TWENTY THOUSAND DOLLARS AND 00/100 ($20,000.00)** in the event of any petition for review to the Texas Supreme Court, together with **TWENTY-FIVE THOUSAND DOLLARS AND 00/100 CENTS ($25,000.00)** in the event the Texas Supreme Court grants the petition, all conditioned upon a favorable result to Delp therein; and further the fee of **ONE THOUSAND FOUR HUNDRED SIXTY-TWO DOLLARS AND 50/100 CENTS ($1,462.50)** for the trial work of Bourland, Kirkman, Seidler, Jay & Michel, L.L.P., all of these being amounts the Court finds reasonable and necessary for Delp to establish his contract claim, and/or alternatively is the appropriate amount for Delp to be awarded under the equities of the case respecting declaratory relief (notably, Nu-Way also requested declaratory relief and attorneys' fees in its pleadings), and/or being relief made available to Delp under bankruptcy law for Nu-Way's violation of the Chapter 11 Plan, as aforesaid.

102. This fee award is made **FREE AND CLEAR** of any claims of Nu-Way or Economy against Delp/Delp IRA, and **PRIOR IN RIGHT** to any claims of Nu-Way and/or Economy against Delp/Delp IRA.

103. The Court also makes the following declarations and statements of remedies under the Declaratory Judgment Act, Chapter 37 of the Tex. Civ. Prac. & Remed. Code:

a. The Delp IRA and its contents when Delp filed his Petition in bankruptcy were exempt from Nu-Way as a then-existing creditor;

b. The Delp IRA, and all its contents, were exempt from Nu-Way as a creditor on the date of the confirmation of the Harvison Plan;

c. No use of those Delp IRA assets subsequent to either of those dates have destroyed the exempt nature of the IRA assets insofar as relates to claims of Nu-Way against Delp and/or Delp IRA originating prior to the bankruptcy filing or the confirmation of the Harvison Plan;

d. All assets traceable back to those petition or Plan-concurrent assets ("bankruptcy assets") continue now, and will remain, exempt from any and all collection efforts against Delp or Delp IRA on any prepetition debt, including in its entirety the claims and debts encompassed in both (1) Nu-Way's proofs of claim in Delp's Chapter 11, and (2) Nu-Way's Nondischargeability Judgment in Bankruptcy Court against Delp. The accrual dates and the dates of the genesis of all those claims precede the dates of Delp's Petition and the Plan confirmation in Delp's Chapter 11 case;

e. Nu-Way agreed in the Plan not to seek collection of those prepetition debts against Delp IRA, but has breached that contractual and legal obligation continuously in this litigation;

f. The Court's attorneys' fee award hereinabove based on breach of contract is hereby also alternatively made under the Declaratory Judgment Act, Chapter 37, Texas Business & Commerce Code.

K. **Disposition of the Case**.

104. Therefore, the Court decrees that:

(A) Nu-Way and Economy **TAKE NOTHING**, and Nu-Way's claims and

Economy's claims, to whatever extent they have or may have been raised or advanced, if any, as well as such other or further claims as could have been raised herein with due diligence, of whatever type or sort–turnover, garnishment, or otherwise–are hereby **DENIED AND DISMISSED WITH PREJUDICE**;

(B) Nu-Way is declared to have no right, title, or interest in Delp *IRA*, and cannot further attempt to collect any claim it has or may have or which might have been raised herein by due diligence against Delp or Delp IRA, via turnover, garnishment, attachment, or any and all other post-judgment process (1) against Delp *IRA*, or (2) against any contents therein or proceeds therefrom, or (3) against any *properties* of Delp which are proceeds of property of Delp IRA on Delp's Chapter 11 petition date and/or his Chapter 11 Plan confirmation date;

(C) Nu-Way **TAKES NOTHING** against Economy by way of garnishment, and the Writ of Garnishment is hereby ordered **DISCHARGED**;

(D) Post-Judgment interest shall accrue on the entire Judgment at the rate of **FIVE PERCENT (5%)** compounded annually; and

(E) All costs shall be taxed against Nu-Way.

L. **Adoption Clause**.

105. Any conclusions of law hereinabove which constitute findings of fact are hereby adopted as such.

SIGNED on this the 8th day of December, 2004.

/s/Jeff Walker
JUDGE PRESIDING

Approved as to Form and Content:

/s/Thomas F. Harkins, Jr.
Mack Ed Swindle
Thomas F. Harkins, Jr.

Approved as to From Only:

/s/Stefanie Martin Klein
Frank Hill
Stefanie Klein

Approved as to Form Only:

/s/Don E. Herrmann
Don Herrmann
Bart Rue

End of
Part 1–Lower Court Rulings (Items 1-6)

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Part 2–Proof of Issues Raised (Items 7-12)

(Following)

7 *Nu-Way Energy Corporation and Economy Oil Company, Plaintiffs, v. Billy R. Delp, Jr., Defendant,* Cause No. 96-183839-00, 96th Judicial District Tarrant County, Texas (April 12, 2004) (Pertinent Extracts from Amended Joint Stipulations of Facts by the Parties in the Trial Court):

CAUSE NO. 96-183839-00

NU-WAY ENERGY CORPORATION,	§	IN THE DISTRICT
	§	COURT
Garnishor/Plaintiff,	§	
	§	
v.	§	
	§	
ECONOMY OIL COMPANY,	§	TARRANT COUNTY,
	§	TEXAS
Garnishee/Defendant,	§	
	§	
BILLY R. DELP, JR.	§	
	§	
Defendant	§	96TH JUDICIAL
	§	DISTRICT

AMENDED JOINT STIPULATIONS OF FACTS BY THE PARTIES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW NU-WAY ENERGY CORPORATION ("Nu-Way"); ECONOMY OIL COMPANY ("Economy"); and BILLY R. DELP, JR. ("Delp"), stipulating to the following for the convenience of the Court and the simplification of the evidentiary

submissions.[1]

1. Billy R. Delp, Jr. owns an individual retirement account (Delp IRA) which began as a rollover account from a qualified ERISA plan. This Delp IRA–BILLY R. DELP, JR., INDIVIDUAL RETIREMENT ACCOUNT, is and has always been self-directed.

2. Delp and another individual, John H. Harvison ("Harvison"), were co-principals of Nu-Way and Economy for some time.

3. More specifically, Harvison and Delp were officers and directors of Nu-Way and Economy as follows:

a. Harvison:

i. *Nu-Way*:

Offices & Time Frames: Vice President, 1987-Present
Director, 1987-Present.

ii. *Economy*:

Offices & Time Frames: Vice President, 1987-1993
President, 1993-Present
Director, 1987-Present.

b. Delp:

i. *Nu-Way*:

Offices & Time Frames: President, 1987-1992

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1 Footnote 1 to these Stipulations reads: "1 No parties intend any legal admissions by their consent to the facts as recited herein."

Director, 1987-1992.

ii. *Economy:*

Offices & Time Frames: President, 1987-1992
Director, 1987-1992.

4. In 1988, Economy executed a note to Texas American Bank, guaranteed by both Billy R. Delp, Jr., and John H. Harvison, in the principal amount of $1.6 million.

5. Delp filed a voluntary petition seeking Chapter 11 relief November 4, 1991.

6. In November 1991, Delp filed his required Schedule "C" in his Chapter 11 Bankruptcy. No one objected to Schedule "C."

7. The meeting of creditors in Billy R. Delp, Jr.'s Chapter 11 Bankruptcy case took place on December 11, 1991.

8. Harvison and related companies filed proofs of claim in the Delp bankruptcy. 7HBF, Ltd., then a shareholder in the parent company of Nu-Way Oil and Nu-Way Distributing, filed proofs of claim on behalf of Nu-Way Oil Co. and Nu-Way Distributing.

9. Nu-Way Oil Company and Nu-Way Distributing subsequently merged into Nu-Way Energy Corporation on June 2, 1998.

10. Harvison and HBF Financial, Ltd., proposed a plan of reorganization in Delp's Chapter 11 case ("Harvison Plan"). A true copy of the Harvison Plan is Exhibit "A" hereto. [No Exhibits to these Stipulations are included in this Appendix.]

11. In addition to the Harvison Plan above, attached also related to that Plan are true copies of the Disclosure Statement and the Order Confirming the Plan, Exhibits "B" and "C," respectively. (The version of "Harvison's Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Date: April 15, 1992" which was submitted previously as Exhibit "B" to Delp's Notice of Filing Exhibits to Joint Stipulations of Facts by the Parties, was not the correct document. The correct Disclosure Statement is submitted by Nu-Way as its Exhibit "8.")

12. Harvison's Fourth Amended Plan was confirmed by the Bankruptcy Court after a cram-down hearing.

13. Economy had earlier filed its Chapter 11 bankruptcy case in August, 1989.

14. One of the claims filed in Economy's bankruptcy related to the Texas American Bank loan referenced in ¶ 4 above, which was collateralized by 175,000 Units of FFP, in addition to being guaranteed by Delp and Harvison.

15. After some transfers, the banking institution which ultimately held this Economy debt in the Economy bankruptcy was FAMCO ("FAMCO Claim").

16. FAMCO and Economy reached a settlement on that claim. Specifically, the claim was divided into two parts: (a) a secured claim for $350.000 [*sic*], with the 175,000Units [*sic*] as the security and the Delp and Harvison guarantees; and (b) an unsecured claim for the balance for $1,320,000, the latter evidenced by a new note. In the ultimately confirmed Economy Plan, the unsecured debt was halved to $660,000.

17. In 1992, FAMCO included its claims from the Economy bankruptcy in a package of debts which it sold to an unrelated company referenced as "FFRE."

18. Delp and FFRE entered into an agreement on December 18, 1992 relating to the Economy Claim portion of the FAMCO package. A true and correct copy is attached as Exhibit "D" hereto.

19. Thereafter, on December 30, 1992, Delp IRA's Trustee bought the FAMCO Claim with its secured note and the 175,000 FFP Units as collateral, having a face value of $350,000, for $250,000, along with Delp's Guarantee. Consolidated C Stores, Inc. (Delp's son's company) bought the unsecured note, face value of $660,000, for $50,000.

20. In that respect, attached as Exhibits "E"–"G" are the following documents:

a. "Agreement" signed on December 18, 1992 between "Billy R. Delp, Jr." and "First Financial Resolution Enterprises, Inc." ["FFRE"] by "Michael H. Cottrell, President" (Ex. "E");

b. "Assignment of Note, Obligations, and Security Documents" dated as of December 30, 1992 between "Consolidated C Stores, Inc." by "Billy R. Delp, III" [Delp's son] (Ex. "F");

c. "Assignment of Claim and Obligations" dated as of December 30. 1992 between FFRE and "Bank One, Trustee for Billy R. Delp, Jr. IRA" by "James Palmer." (Ex. "G")

21. This sale, called the "FFRE Transaction," took place after the initiation of Delp's Chapter 11, but before the Harvison Plan was confirmed.

22. The FAMCO secured debt that was purchased by Delp IRA was purchased with assets held in Delp IRA when Delp filed his aforesaid Chapter 11 bankruptcy case.

23. On August 21, 1997, the United States Bankruptcy Court for the Northern District of Texas signed a judgment in Adversary No. 492-4030, in which Nu-Way Distributing Company was awarded judgment against Delp in the amount of One Million Eight Hundred Twenty Thousand Seventy Two Dollars and 73/100's ($1,820,072.73), together with post-judgment interest thereon at the rated of 5.58% per annum, and in which Nu-Way Oil Company was awarded judgment against Delp in the amount of Two Hundred Fifty Thousand Two Hundred Ninety Two Dollars and 52/100's ($250,292.52), together post-judgment interest at the rate of 5.58% per annum thereon (the "Nu-Way Judgment").

24. The Nu-Way Judgment is final, and all appeals have been exhausted.

25. No payments have been made on the Nu-Way Judgment.

26. Nu-Way Energy is the surviving entity of a merger of Nu-Way Energy, Nu-Way Oil and Nu-Way Distributing, and is the owner of the Nu-Way Judgment.

27. Hill Gilstrap, P.C. and its predecessors have done legal work for John H. Harvison, some of the FFP entities, some or all of the Nu-Way entities, and Economy Oil Company during the past fourteen years or so. Stefanie Klein has worked on many, but not all, of the matters on which such companies have retained Hill Gilstrap.

28. The parties wish to defer any attorneys' fees evidence or issues pending resolution of the case in chief.

WHEREFORE, the parties hereto, through their Counsel, submit these as stipulated facts for purposes of the Trial of this Cause, and ask the Court to rule accordingly.

Respectfully submitted,

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ATTORNEYS FOR ECONOMY

Dated as of /s/April 12, 2004.

8 Extracts from Amended Brief of Appellee [Petitioner Delp] to Waco Court of Appeals:[2]

NO. 10-05-00065-CV

IN THE TENTH APPEALS COURT OF TEXAS AT WACO

NU-WAY ENERGY CORPORATION,

Plaintiff/Appellant,

v.

BILLY R. DELP, JR.,

Defendant/Appellee.

ON APPEAL FROM THE 96TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

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2 Most omitted items relate to irrelevant intervening State Court judgment.

CAUSE NO. 96-183839-00

AMENDED BRIEF OF APPELLEE

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* * * [Omits other formal portions and Tables.]

STANDARD OF REVIEW

This is an appeal from a trial to the Court. Most of the facts were stipulated. Judgment was for Defendant Delp. Amended Findings of Fact and Conclusions of Law were issued. "Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict." *Haas v. Voigt*, 940 S.W.2d 198, 200 (Tex. App.–San Antonio 1996, writ denied) (internal citation omitted); *Pace v. Pace*, 160 S.W.3d 706, 710 (Tex. App.–Dallas 2005, pet. denied). "If the trial court does not state a legal theory upon which his ruling was based, the Judgment will be upheld on any legal theory that has support in the evidence." *Haas*, *supra*, 940 S.W.2d at 200-201 (citation omitted).

"When an appellate court reviews a finding of fact for legal sufficiency, it considers only the evidence and inferences that tend to support that finding, and disregards all of the contrary evidence and inferences." *Pace*, *supra*, 160 S.W.3d at 711(citations omitted). "An appellate court upholds a finding of fact if it is supported by more than a scintilla of evidence." *Id.* (citation omitted); *accord*, *City of San Antonio v. TPLP Office Park Properties, Ltd.*, 155 S.W.3d 365, 373-74 (Tex. App.–San Antonio 2004, pet filed).

ISSUES PRESENTED

* * * [Relates to mootness of state-law remedies.]

2. Is Nu-Way bound by the Bankruptcy Plan (DAppx

M) since it:

(a) filed proofs of claim;

(b) participated in the Plan process;

(c) aligned itself with the Plan's author and proponent;

(d) listed itself in the Plan–

(i) as an affected creditor, and

(ii) as a potential recipient of payment;

(e) failed to object to Delp's listed exemptions; and

(f) failed to object to the Chapter 11 Plan in Delp's bankruptcy?

3. Do res judicata, quasi-estoppel, waiver, settlement, or enforcement of contract terms defeat Nu-Way's efforts to collect from Delp IRA?

4. Did Delp IRA lose its exemption?

5. Does Nu-Way have a right of offset as to the attorneys' fees?

6. Was there more than a scintilla of evidence to support the Amended Final Judgment and the Amended Findings of Fact and Conclusions of Law? (*See Haas v. Voigt*, *supra*, 940 S.W.2d at 200.)

7. Did Nu-Way sufficiently challenge the judgment on any grounds adequate to obtain reversal, or merely "harmless error" (if any, *arguendo*);

8. Did the Trial Court make any error, or abuse its discretion, in a fashion resulting in any prejudice to Nu-Way warranting reversal or remand?

STATEMENT OF FACTS

Appellee Delp had a "business partnership" with JOHN HARVISON ("Harvison") for many years. During that time, the pair had retirement plans which they rolled over into IRA's. 1CR3 396, Stip ¶ 1. Nu-Way agrees that as of the rollover, Delp IRA was exempt from collection under all applicable laws. AB 2.

After differences with Harvison arose, various litigation and divisions of property transpired. In the process, Delp was obliged to enter Chapter 11. He filed a Schedule C, which lists what the debtor claims as exempt. 1CR3 397, Stip ¶ 6. Delp IRA was listed in this Schedule C. *Id.* It was then valued at $1,118,138.00. AB 3. No one filed any objection to Delp's Schedule C listed exemptions. 1CR3 397, Stip ¶ 6.

Harvison is and was at all relevant times the principal of Economy, Nu-Way, and, FFP Partners, L.P. ("FFP"). 1CR13 1873 ¶ 7. Harvison and these companies are in privity "for all purposes in this litigation." *Id.* ¶ 8; 1CR13 1875 ¶ 26; 1CR 13 876-877 ¶¶ 35-36. Notably, Harvison, Nu-Way, Economy, and FFP have all been, and are still, represented by the Hill law firm, beginning no later than 1991. 1CR3 397 ¶ 3.a.; 1CR3 400 ¶ 8.

Nu-Way filed proofs of claim against Delp for prepetition debts. CR3 400 ¶ 27; DAppx I. Nu-Way admits this. *Id.* Thereafter, Harvison submitted a Plan for Delp's bankruptcy. 1CR3 398 ¶ 10; PAppx M[.] This Plan was confirmed. DX 18. In ¶ 1.02 the Plan says: "'Associated Group' consists of John

Harvison, **Nu-Way Oil Company, Nu-Way Distributing Company**, FFP Operating Partners, L.P., [and others]." 1CR6 813. Nu-Way was also on the "Related Entities" list in **¶ 1.26**. 1CR6 813. Nu-Way is a **Class 9 creditor, ¶ 4.09**, benefitting *ahead of* the "Debtor and Debtor's spouse," in Class **10**. Plan **¶¶ 4.09 & 4.10**; DX 17; 4CR 286 *passim*; DAppx M at 11-12; 1CR6 833-34.

Harvison and his privies further benefitted because the Liquidating Trustee was instructed to "sell, settle, or compromise all litigation claims against John Harvison, *the Related Entities* . . . and any and all other litigation claims of the Debtor, within *ninety (90) days* from the Effective Date." Plan **¶ 5.03**, 1CR6 825; DX 17 at 13.

The Harvison Plan clearly defines what Delp did, and did not, "retain":

> **4.10** Class 10 consists of the interest of the Debtor *and the Debtor's spouse* and is impaired under Harvison's Plan. The Debtor *and the Debtor's spouse* shall be entitled to *retain* their homestead, subject to all valid liens, and their personal property scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities. The Debtor *and the Debtor's spouse* shall *retain* no non-exempt assets, except to the extent the net proceeds of liquidation exceed all allowed claims, including interest to the date of payment, which excess, if any shall be paid to the Debtor.

CR6 at 824. Retain Schedule C; give up everything else. Also, Nu-Way *goes beyond* what it could legally acquire for collection on its debt–it reaches into the *spouse's* pocketbook. [n.12]

——footnote 12——

2 Bankruptcy law does not allow this. *In re Nahat*, 278 B.R. 108 (Bkrtcy. N.D. Tex. 2002).

——end footnote——

The Plan binds "*any* Creditor." Plan ¶ **9.03**; 1CR6 835. This is not limited to "any *nondischarged* Creditor." Nu-Way was in privity with the Plan drafter. If it had *wanted* not to be affected by the Plan, it was obliged to put in *clear language* to that effect. It did not. Nu-Way is as "bound" to ¶ **4.10** as any other creditor. Delp kept "personal property scheduled as exempt under Schedule C." Schedule C included Delp IRA. DAppx H.

Nu-Way invokes ¶ **9.01**, which provides that "the discharge shall not discharge the Debtor from any *claims* which are ultimately determined...to be nondischargeable pursuant to the allegations of any pending adversary proceedings." DAppx M at 21. However:

(a) This provision *distinguishes between* one type of nondischargeable claim–enforceable, and the other–not, based on *the pendency of litigation*. This plainly addresses nondischargeable claims, and limits the viability thereof to those who *are litigating*;

(b) The proviso limits its applicability to nondischargeable claims in their capacity as "*claims*"–in other words, *not* terms relating to against *what properties* such nondischargeable creditors may collect; and

(c) While perhaps some *third party* nondischargeable creditors *might* have a basis to challenge the Plan's impact on it,

Nu-Way does not.

Nu-Way's (1) participation in the Case, and (2) its repeatedly advertised relationship with the Plan's drafter and proponent, Harvison, binds Nu-Way to the Plan, and **¶ 4.10**, thereof, *supra*. Nu-Way's connections with the Delp bankruptcy case include: (a) filed proofs of claim, CR3 397 **¶ 8** & DAppx I; (b) is a creditor, Plan **¶¶ 1.02** (1CR3 813); **1.26** (*id.* at 817; **4.09** (*id.* at 833-34), specifically listed as such in the Plan, (c) takes all Delp and his spouse has, Plan **¶ 4.10** (*id.* at 834), excepting only Schedule "C." *Id.* DAppx H.

Despite this clear bankruptcy bar, Nu-Way filed *two* suits, AB2, seeking, (1) Delp's "rights under Delp's Judgment" against Nu-Way's sister company Economy; and (2) the security for Delp *IRA*'s Judgment on that claim 1CR1 3. The security was at that time in the Registry of the 342nd District Court, Tarrant County, No. 342-153149-94. 1CR1 21; DAppx N, O, P, & R. Delp IRA has now been paid and that Registry is now disbursed. [n.13]

* * * [Footnote 13 on state-law remedies omitted as irrelevant.]

Delp's Chapter 11 overlapped that of Economy (Nu-Way's sister corporation). 1CR13 1872, 1874; 1CR3 397-98 **¶ 13**. After Delp's bankruptcy began, FAMCO, a creditor of Economy, sold some non-performing debt properties to a company referenced by the parties as "FFRE." *Id.*, 1CR3 398-99, **¶¶ 14-17**. Included in the package was an Economy debt to FAMCO. *Id.* at 399 **¶¶ 17-18**. On December *18*, 1992, Delp contracted with FFRE to purchase the Economy debt for $300,000. *Id.* However, FFRE did not acquire title to the debt until December *30*, 1992, by bulk sale. 1CR13 1874; 1CR3 399 **¶ 17**; 1CR3 385-95 ("Loan Sale Agreement Bulk Sale # 9296") **¶ 2.3** [DX2; DAppx L]).

Simultaneously, Delp *IRA* purchased the *secured portion* of the Economy debt package from FFRE for $250,000. 1CR3 399. The secured portfolio had [1] a note by Economy for

$350,000, [2] a certificate for 175,000 FFP Units, and [3] Delp's guarantee of the underlying debt. *Id.* Simultaneously, Consolidated C Stores, owned by Delp's son, purchased the *unsecured* debt, a $660,000 note, for $50,000. *Id.* [n.14] At that time, Delp believed Delp IRA had purchased the FFP Units outright. CR13 1874 ¶ 17. However, in the earlier *Economy* lawsuit, it was determined that it had instead obtained a *security interest* with the Units as *collateral*. 1CR13 1874 ¶ 20.

——footnote 14——

14 This overall sale is referred to as the "FFRE Transaction."

——end footnote——

The Trustee for Delp IRA sent the Units certificate to FFP to be re-issued in the name of the purchaser, Delp IRA, and then returned. *Id.* 1873 ¶ 18. However, FFP did not do so. CR13 1873 ¶ 19. Instead, it instituted an *interpleader* action (the *Economy* case). The FFP Units, and thereafter their proceeds, were deposited into the registry of the 342nd District Court for Tarrant County, Texas (the *Economy* Court). *Id.*; AB 8-10; DAppx R.

In *Economy*, the court granted a judgment n.o.v. on certain issues in favor of Economy, but also at the same time ruled that Delp *IRA* (not Delp individually) had purchased a *security interest* and was *entitled to judgment* for $350,000 plus interest against Economy. In or about July 2005, the registry was disbursed to "Billy R. Delp, Jr., IRA" in part, with the balance to Economy.

Up until that disbursement, however, the *Economy* and *Nu-Way* cases were pursued to keep Delp IRA from recovering the assets deposited into the *Economy* registry in the 342nd despite the finality of the Judgment in that case. AB 2. In the 96th litigation, the case below, Nu-Way originally sought turnover of Delp's appellate interest in the *Economy* case. *Id.* This maneuver cements the existence of privity between Nu-Way and Economy.

1CR13 1875-76 ¶¶ **26, 32.** Early on in the case (which is this case), the trial court granted summary judgment, denying Nu-Way's turnover. 1CR13 1876 ¶ **27.** Nu-Way appealed. *Id.* ¶ **28.** Meanwhile, the *Economy* appeals concluded. *Id.* ¶ **29.**

Delp/Delp IRA sought disbursement of the Registry assets. *Id.* ¶ **30.** The Harvison interests had been using the 96th turnover action as a legal venue from which to stop Delp IRA from collecting in the 342nd. However, that case was on appeal. 1CR2 199-200 ¶ **17**; CR 13 1875 ¶¶ **28-29**, *Id.* 1876 ¶ **33.** Therefore, Nu-Way instituted a *garnishment* action, with its sister corporation Economy as the friendly garnishee. 1CR13 1875-77 ¶¶ **31-34.** 1CR2 199 ¶ **17**[.] Nu-Way acknowledges this: "Since Nu-Way's appeal of this Court's denial of turnover relief was pending, Nu-Way initiated its garnishment action at that time." Nu-Way was attempting to skirt the jurisdiction of the trial court.

Nu-Way and Economy (as well as Harvison and FFP) are in privity. *See, e.g.*:

a. Harvison is the leading principal of Nu-Way, Economy, and FFP.

b. The Hill Gilstrap law firm, and specifically Frank Hill and Stefanie Klein (albeit now with her new firm Neligan Tarpley Andrews & Foley LLP), have represented Harvison, FFP, Nu-Way, and Economy on an ongoing basis since at least 1991, including (1) Nu-Way herein, and (2) Economy in the *Economy* case (at least until that case's culmination a month or so ago).

c. Ms. Klein prepared and filed Nu-Way's proofs of claim in Delp's Chapter 11.

d. Hill Gilstrap helped draft proposed Chapter 11 Plans for Delp's bankruptcy on behalf of Harvison

and his companies, including the Fourth Amended Plan which was confirmed (by cramdown).

1CR3 397 ¶ 8; *id.* 400 ¶ 27; 1CR 13 1873 ¶¶ 7 & 8; *id.* 1877 ¶ 35.

Nu-Way's case rests on *proofs of claims*. 1CR3 397-400, ¶¶ 8-9 & 23-26; DX 11-16; DAppx J; 4CR1 185; 255-90[.] Post-confirmation, Nu-Way obtained a nondischargeable bankruptcy judgment against *Delp*. 1CR3 399-400, ¶ 23; DAppx 22; 4CR2 287.

* * * [Omitted portion as to prior State case.]

In any event, Delp/Delp IRA rely on its or their right to the *proceeds* of the IRA as it was constituted on either or both of (a) Delp's deemed exemptions and/or (b) the confirmation of Harvison's Plan in Delp's Chapter 11, leaving Delp IRA his listed Schedule C assets. DX 17 at 12 ¶ 4.10; 4CR2 200. While Delp IRA does actually also remain exempt from *all* creditors for *all* purposes, it more specifically and determinatively is entitled to the benefits of the bankruptcy exemptions as against *Nu-Way*.

After substantial proceedings over several years, Appellee Delp obtained an Amended Final Judgment supported by extensive Amended Findings of Fact and Conclusions of Law. PAppx 1 & 2; CR13 1861-1902. The Judgment and the Findings and Conclusions find for Delp's positions on all points and issues. They should now be in all things **AFFIRMED**.

SUMMARY OF THE ARGUMENT

Delp was a business "partner" with John Harvison ("Harvison"). CR3 396-97 ¶¶ 2 & 3. Disagreements arose and Delp ultimately became obliged to file for Chapter 11 protections. *Id.* 397 ¶ 5. In his filings, Delp listed his IRA as exempt in his Schedule C. *Id.* ¶ 6. No one objected. *Id.* Harvison advanced a plan ("Plan") for Delp's case, in an adversarial fashion. *Id.* 397-98

¶¶ 9-12. It was confirmed by cram down. CR3 398 ¶ 12.

The Plan had many draconian terms. *See, e.g.* CR6 823, 824, ¶¶ 4.10 & 5.03 (treatment of the Delps; fire sale of Harvison litigation). However, the Plan did allow Delp to "retain" Schedule C assets (as it was bound to do under the Code). *Id.* 823 ¶ 4.10. The Plan did not require *assessment* whether Schedule C assets were *actually* exempt; whether when declared or at the time of confirmation–merely, be *listed* as such.

Nu-Way obtained a nondischargeable bankruptcy judgment against Delp. CR1 6-7; AB 7. Meanwhile, Harvison and companies Economy Oil and FFP Partners became embroiled in a lawsuit ("*Economy* litigation") against Delp and Delp IRA to determine rights to certain FFP Units (limited partnership interests) and Economy debt. DX 26; 4 CR2 302 Key was Delp IRA's acquisition of property in 1992 ("FFRE Transaction"). Stip ¶ 21. The judgment vested *title* to the Units in Economy, but gave Delp *IRA* a judgment of $350,000 secured by collateral in the registry (Units and accretions). Op Appx F. As of July, 2005, however, the judgment has now been satisfied and the registry disbursed.

Nu-Way instituted two cases–turnover, and garnishment. 1CR2 196-206. Nu-Way sought *all* Delp IRA assets and the *Economy* Judgment. *See* [ ] 1CR2 201 ¶ 23. ("any other assets belonging to the Billy Delp IRA be applied to the Nu-Way judgment").

Delp's *debt* to Nu-Way *is* nondischargeable. Nonetheless, Delp *IRA* is *exempt from efforts to collect that debt.* Nu-Way's conduct in Delp's bankruptcy accomplished this, *e.g.*:

(a) Nu-Way did not object to Delp's listing Delp IRA as an exempt asset,

(b) Nu-Way filed proofs of claim for all its

claims herein,

(c) Nu-Way formally "associated" itself with the Plan authors,

(d) Nu-Way elected to be listed as a *creditor* of Delp *in the Plan*, including at least *potential* entitlement to recovery under the Plan [n.16], and

(e) Nu-Way *concurred with the Plan.*

——footnote 16——

16 Nu-Way attempts to dismiss this by saying Nu-Way *in fact* received nothing from the bankruptcy case. Delp disputes this. While *Delp himself* never paid Nu-Way anything, it may have received something from the Trustee. However, that is irrelevant, because it *could* have received something from the Trustee under the Plan, regardless whether it actually *did* so.

——end footnote——

1CR3 283 ¶ 6; *id.* at 397 ¶¶ 6 & 8; *id.* at 398 ¶ 11; DX 17 ¶¶ 1.02, 1.26, 2.9, 4.09, 4.10, 503, 6.02, 9.03; 4CR2 175 *et seq.* Thus, Nu-Way *forfeited* that "exemption."

Delp IRA is exempt. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). All traceable proceeds from that property are exempt from *prepetition creditors* on *prepetition debts*. *Lowe v. Reed (In re Reed)*, 184 B.R. 733 (Bkrtcy. W.D. Tex. 1995). Nu-Way says it did not object then *because there was no basis to object at that time*. This is just the point. If there was no basis to object *when they were listed*, those assets were *from thenceforward exempt*. They did not have to "stay" exempt. The nondischargeable nature of Nu-Way's claim goes to the right of Nu-Way to *continue seeking* to collect its judgment, not to *attach*

exempt assets in that process. Alternatively, Nu-Way *forfeited* whatever right it might otherwise have had to Delp's exempt assets by its conduct and participation in the Delp bankruptcy. Further, it is barred by res judicata from claiming Delp IRA lost its exemption.

ARGUMENT

* * * [Omitted discussion of mootness issue.]

B. DISCHARGEABILITY OF A DEBT DOES NOT AUTOMATICALLY CONTROL THE DEBTOR'S EXEMPTION OF SPECIFIC PROPERTY.

C. A NONDISCHARGEABLE CREDITOR WHO PARTICIPATES IN THE DEBTOR'S CASE IS BOUND BY PLAN TERMS RE EXEMPTIONS.

[Footnote omitted.]

Nu-Way argues that neither listing property as exempt nor exemption thereof in a bankruptcy plan restrains creditors with nondischargeable debts from attaching that exempted property. However, the statute's terminology is: "confirmation of a plan does not discharge any individual debtor from any *debt* excepted from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2) (DAppx 3). Delp's "debt" to Nu-Way is intact. However, property *exempt* as of the bankruptcy or Plan remains exempt from Nu-Way.

In construing a legislative provision, "a statute's plain meaning should be conclusive . . ..." *In re Box*, 324 B.R. 290; 2005 Bankr. LEXIS 753 at *8 (Bkrtcy. S.D. Tex. May 4, 2005) (citation omitted). *Accord, Ex parte 1993 Custom Van*, No. 07-97-0254-CR; 1997 Tex. App. LEXIS 6364 at *5 (Tex. App.–Amarillo Dec. 10, 1997, no hist.) (not designated for publication). Also, the specific excludes the general. *Custom Van, supra*, 1997 Tex. App. LEXIS 6364 at *6 ("In construing a statute, the general rule

is that when a statute specifically enumerates matters or powers, that specificity is tantamount to an exclusion of those matters not listed.") (cite omitted). By saying "debt," but not "property," Congress meant any *property exemptions* should stay in place, but the *debt* remains *recoverable*.

See, *e.g.*, *Rice v. Parks*, No. 1:98CV00731; 1999 U.S. Dist. LEXIS 21229 at *9-11 (M.D.N.C. Nov. 9, 1999) *aff'd without opinion*, 243 F.3d 539 (4th Cir. 2001) (DAppx 4):

> [B]y combined operation of § 522(c) and the Settlement Agreement entered in this case, the entire property listed as exempt in Parks' Chapter 7 proceeding was protected from Rice's present attempt to collect the *nondischargeable* prepetition debts owed to him by Parks. . . . [P]ursuant to § 522(c), creditors' rights to collect those nondischargeable prepetition debts are subordinate to the debtor's rights in property exempted in the bankruptcy case. . . . As has been noted, § 522(c) produces a "curious result." "The judgment holders are free to obtain a postpetition execution against the debtor's non-exempt . . . property. However, they are not free to issue execution on the exempted property. They will, therefore, have to wait for the debtor to acquire additional property to satisfy their claim."

See also id. at *26 ("Now, under the mandate of § 522(c) (DAppx 1) that property is not available to Rice, the holder of a prepetition debt, albeit a nondischargeable debt.").

Further, construing nondischargeable claims as *always* "outside the ambit of the bankruptcy case" is inconsistent with the Code. Under 11 U.S.C. § 523(c) (DAppx 2), the debtor *is discharged* on debts that are *nondischargeable* "unless, on request of the creditor to whom such debt is owed, and after notice and a

hearing, the court determines such debt to be excepted from discharge . . .." *See Bank of Louisiana v. Pavlovich (In re Pavlovich*, 952 F.2d 114, 116 (5th Cir. 1992) ("The bank...waived its right to file a complaint objecting to discharge or dischargeability by not timely raising these issues before confirmation."). Obviously recognizing this, Nu-Way filed its "Complaint to Determine Dischargeability of Debt" in Delp's bankruptcy on February 7, 1992, DX 20; DAppx K.

Just as importantly, Nu-Way *participated* in Delp's bankruptcy in a *quid pro quo* arrangement. Regardless Nu-Way's *obli*gation to participate in the bankruptcy, it *chose* to. A creditor may not actively interact with the Debtor's case, for the creditor's benefit, and yet escape all consequences. Nu-Way could collect against all Delp's properties, and even *Mrs. Delp's* properties. DAppx M ¶ **4.10**. But there was one "quid pro quo." Nu-Way could *not* attach the properties listed in Schedule C. *Id.* If Nu-Way was not obliged to the Plan terms by *law*, it was in *fact* bound as a result of its *participation*. [n.18]

——footnote 18——

18 Some of the following *stipulated facts* illustrate Nu-Way's involvement: (a) Harvison has been at least a co-principal of Nu-Way (and Economy) for many years; (b) Harvison has been a vice-president and director of Nu-Way from 1987 to present; (c) Harvison et al. (including Nu-Way) filed proofs of claim in Delp's bankruptcy; (d) Harvison proposed a Plan in Delp's bankruptcy; and (e) the *size* of Nu-Way's claim has ultimately been shown to be $1,820,072.73 *plus* $250,292.52. Stip ¶¶ **2, 3, 8, 10-12, & 23**. In this case, at least, what was good for Harvison et. al. was good for Nu-Way, and vice versa. Nu-Way's *current* posture–that there was just no benefit in its participating under the Plan–is belied by the fact that Harvison et al. went to so much trouble to craft and obtain confirmation of the Harvison Plan. Nobody goes to that much trouble for nothing.

——end footnote——

A prime example of this rule is an institutional creditor with unquestionably nondischargeable debts–the IRS, recovering on tax liens. Despite that status, *repeatedly* courts hold that IRS participation of the IRS [*sic*] in various bankruptcies operated to *modify* the IRS' collection opportunities from what they were absent the interaction. *See Martin v. United States (In re Martin)*, 150 B.R. 43, 46-47 (Bkrtcy. S.D. Cal. 1993) (DAppx 5):

> [T]he IRS concludes a confirmed plan has no effect on the IRS' ability to assess and collect its non-dischargeable taxes outside the plan. . . . Here, the IRS chose to participate in the plan, negotiating with debtors and reaching agreement on a filing schedule for missing returns. It . . . agreed to the form of the confirmation order after hearing and filed its proof of claim according to the agreed procedures. Now it wants to be free to pursue other determination and collection techniques as though it had never submitted a claim under the bankruptcy case. *It argues that the confirmed plan specifically included the text of § 1141(d)(2) and therefore excludes non-dischargeable taxes from its operation.* [Nu-Way also argues this. AB __ [*sic*].]
>
> . . . *Although a plan cannot discharge the debt, it may otherwise subject the debt to its provisions*. . . . "Stated another way, § 1141(d)(2) preserves the right of a creditor holding a nondischargeable debt to full payment. It <u>does not provide that the provisions of a confirmed plan cannot affect the rights of such a creditor</u> . . .."
>
> In the case at hand, the IRS had full opportunity to participate in the plan process, and

it chose to represent to the Court that it was satisfied with the agreed procedures for determining the amount of its nondischargeable claim, which effectively modified the creditor/debtor relationship. ... The IRS has subjected itself to this Court's jurisdiction and should not be allowed to object at this late date . . .. The Court finds the IRS is bound to the procedures...in the confirmed plan.... [Emphasis added.]

Paralleling *Martin*, in *this* case we have:

(a) a nondischargeable creditor [CR2 2080209]

(b) voluntarily subjected itself to bankruptcy court's jurisdiction [DX 17]

(c) filed proofs of claim [DAppx I]

(d) closely aligned and in privity with the Plan's proponent's [*Id.* M], and

(e) benefitted [n.19] from inclusion of Plan provisions (including the right to Mrs. Delp's properties regardless what actually eventuated therefrom. [*sic*] [*Id.* M ¶¶ 4.09, 4.10, & 5.03].

——footnote 19——

19 Nu-Way suggests Delp conceded Nu-Way has not *benefitted* from the bankruptcy. All Delp conceded is *he* did not pay anything to Nu-Way. Certainly, however, Nu-Way benefitted from its participation in Delp's bankruptcy and under the Plan in numerous ways, as will be discussed.
——end footnote——

Application of *Martin* here is more compelling than in *Martin* itself. Here, the *creditor* crafted the plan, instead of the debtor. DX 17. Nu-Way should be restricted to collect its nondischargeable debt from assets *other than Delp IRA*, just as the Plan provides.

In the *Rice* case above, an alternative holding was that "a creditor cannot both accept the benefits of a Settlement Agreement and thereafter object to the exemptions that the Settlement Agreement grants the debtor." 1999 U.S. Dist. LEXIS 21229 at *29. Here:

(a) creditors have rights to assets of the Debtor's *spouse*, DX17 at 12, to which they had no legal right, *In re Nahat*, 278 B.R. 108, *passim* (Bkrtcy. N.D. Tex. 2002) (creditors cannot reach spouse's assets);

(b) a provision is made for payment to Class 9 creditors (i.e., Nu-Way) ahead of any payments to Debtor (Delp), Plan at 12, DX 17; and

(c) settling and/or dismissing causes of action *favorably to Harvison's Group*, and *detrimentally to Delp*. *See, e.g.*, Plan ¶ 5.03, DX 17.

In return, Nu-Way consented to the Plan's proviso that Delp could "***retain***" Delp IRA free and clear from collection on prepetition debts, regardless whether [ ] (1) Delp *otherwise* had that right, or (2) if it was *contrary to the* Code, or (3) even if it was *illegal*. DAppx ¶ 4.10.

In *United States v. Black*, 44 Collier Bankr. Cas. 2d (MB) 1; 85 A.F.T.R.2d (RIA) 1846; 2000 U.S. Dist. LEXIS 5880 at *15-

21. (D. Ariz. March 30, 2000) (DAppx 3), the IRS argued its lien "is not dischargeable debt pursuant to § 507(a) of the Code, and did not waive its rights by not objecting to the Modified Plan or Order." *Black, supra*, 2000 U.S. Dist. LEXIS 5880 The Court (a) found the IRS was *correct* about the impropriety of the Plan provision; but, nevertheless (b) *ruled for the Debtor*, the plan being *res judicata*.

Nu-Way's principal, Harvison, drafted the Plan provisions. DAppx M. As part and parcel, the Plan affected Nu-Way's interests (placed under bankruptcy jurisdiction *by Nu-Way* in filing its proofs of claim and other participation). DAppx I. As benefits (or, equivalently, *legal entitlements*, regardless whether they ever actually inured or not [n.20]) the Harvison Associated Group (a) adopted oppressive terms against Delp, providing Delp only what Harvison thought was what Delp would be able to retain anyway; (b) made Delp's wife's property susceptible to collection; (c) avoided potentially revealing, costly litigation with the uncertain prospect of exposure; and (d) then placed themselves ahead of Delp *in all instances* in the event of bankruptcy collections. DAppx M.

——footnote 20——

20 Nu-Way's position of a total lack of benefit would deprive any purpose from its being included in Class 9. DAppx M. "Courts apply the rules of contract interpretation to the interpretation of a reorganization plan." *In re Rincon, infra*, 133 B.R. at 596 (citation omitted). A reading which makes a term meaningless or "absurd" is to be avoided. *Karen Corp. v. Burlington Northern & Santa Fe Ry. Co.*, 107 S.W.3d 118, 123 (Tex. App.–Fort Worth 2003, pet. denied), *citing Temple-Eastex, infra*, 672 S.W.2d at 798; *Pratt-Shaw v. Pilgrim's Pride Corp.*, 122 S.W.3d 825, 829 (Tex. App.–Dallas 2003, pet. denied); *cf. Continental Casualty Co. v. Warren*, 152 Tex. 164, 171; 254 S.W.2d 762, 765 (1953).

——end footnote——

Nu-Way seeks to capture one last possession, Delp IRA. Implicitly Nu-Way seeks to *modify* the Plan, whereby ¶ 4.10 would *add*, "except for nondischargeable debts." Nu-Way *could* have added that term but didn't. Therefore, Nu-Way is bound by the Plan as it reads. "Some courts have approved [plan] injunctions that, in effect, require the creditor to await payment under the plan even though the creditor's claim is nondischargeable." 8 Lawrence P. King, *Collier on Bankruptcy* P 1141.05[2] (15th ed. rev. 2001). The Plan's limit on property from which Nu-Way may seek is not fundamentally distinct.

D. DELP IRA IS EXEMPT FROM COLLECTION BY NU-WAY.

1. *By Res Judicata.* [n.21]

——footnote 21——

21 *Compare Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 781; 31 Bankr. Ct. Dec. 475 (4th Cir. 1997) ("[T]he Taxing Authorities are bound not by 'res judicata and preclusion' but by the statutory provision itself. That Bankruptcy Code provision, which exempts plan transfers from every state 'stamp tax or similar tax,' is a congressional enactment that binds the state and its counties whether they have notice or not. The [*sic*] are so bound neither solely nor primarily because the bankruptcy court entered an order incorporating the tax exemption provision, but because the federal government has power under the Bankruptcy Clause of the Constitution art. I, § 8, cl. 4, to enact such a provision, and any bankruptcy provision enacted within constitutional authority applies directly to a bankruptcy estate and takes precedence over conflicting state provisions by reason of the Supremacy Clause, U.S. Const. art. VI, § 2. The provision for tax exemption at issue here operates against the states in a fashion similar to, for example, the automatic stay provision, 11 U.S.C. § 362. The force of such legislative enactments is not derived from a court order or prior adjudication, but from the legislative enactments themselves."). Delp invokes this reasoning as a further

or alternative ground for bankruptcy defeating Nu-Way's case. The Code has direct effect.

——end footnote——

a. Under Bankruptcy Law.

Creditors may be barred by direct statutory law or plan provisions from arguing matters they did not timely raise in the bankruptcy case. Extensive case law affirms that even *illegal* provisions of plans are accorded *res judicata* effect, much less those merely specifying what class of property may be collected against:

> The finality of confirmation orders is a bedrock principle of bankruptcy law. *In re Pardee*, 218 B.R. 916, 924, *aff'd* 193 F.3d 1083 (9th Cir.1999) (the Plan is *res judicata* as to all issues that could have or should have been litigated at the confirmation hearing).
>
> *In re Pardee*, 193 F.3d 1083 (9th Cir.1999) is instructive. In *Pardee*, debtors in a chapter 13 plan expressly proposed to discharge post-petition interest on a student loan debt. The creditor did not object to the plan, but later attempted to collect the interest after confirmation. Both the Bankruptcy Court and the Bankruptcy Appellate Panel (BAP) found in favor of debtors, and the creditor was thereafter enjoined from any further debt collection activity. The creditor alleged that the student loans were nondischargeable pursuant to 11 U.S.C. § 523, and therefore the plan to discharge the debt was in violation of the Code. The BAP held that the confirmed plan was *res judicata* regarding the discharge provision, even if the provision was contrary to the Code or Rules, and that the

creditor's failure to object or appeal the confirmation constituted a waiver.

Another recent holding resounds the same conclusion. In *Andersen v. UNIPAC-NEBHELP (Andersen)*, 179 F.3d 1253 (10th Cir.1999), the debtor's plan proposed to discharge an unpaid student loan. The creditor did not object or appeal. The Tenth Circuit gave the confirmed plan *res judicata* effect, discussed the creditor's failure to challenge the plan, and emphasized the strong policy considerations favoring the finality of confirmation orders. *Id.* at 1259. The Court in *Anderson* further held, it is absolutely incumbent upon a creditor to take an active role in protecting its interests, and a creditor which fails to do so is in a poor position to later complain about an adverse result." *Id.* at 1257.

In *Ground Systems, Inc. v. Albert*, 213 B.R. 1016 (9th Cir. BAP 1997), the Bankruptcy Court confirmed a chapter 11 amended plan of reorganization. There were no objections to the amended provisions at confirmation. Subsequent to the confirmation order, an unsecured creditor opposed the plan. *The Bankruptcy Court found that the plan provision was in conflict with the Code and should not have survived confirmation.* Despite that finding, the court allowed the provisions of the plan to remain in effect. The court reasoned that even if the plan violated the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, it was appropriate for the Bankruptcy Court to give *res judicata* effect to the plan. *Ground Systems*, at 1019; *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir.1995) (a plan provision that is contrary to the Code or is otherwise illegal may not be challenged post-confirmation for the

first time).

> In *In Re Gregory*, 705 F.2d 1118 (9th Cir. 1983), the Bankruptcy Court confirmed a plan that provided for no payment to unsecured creditors and a *discharge of all debts*. No objection was made at the confirmation hearing. *Two months following confirmation, a creditor disputed the dischargeability of a debt*. The *Gregory* court refrained from ruling on the legality of the payment plan, finding that the creditor's failure to raise an objection at the confirmation hearing or to appeal from the Order of confirmation precluded any subsequent proceeding. *Id.* at 1121.

Black, supra, 2000 U.S. Dist. LEXIS 5880 at *16-19 (emphasis added).

Nu-Way argues that Delp *IRA*'s purchase of certain property–acquired postpetition, with exempt funds, and preconfirmation–was "prohibited" by tax law, defeating Delp IRA's exemption. This is an incorrect assessment of the situation. *See infra.* However, it does not matter whether the transaction was "prohibited" or not. It occurred *prior to the confirmation date*. Upon confirmation, Delp IRA *had already purchased*, and still owned, the challenged assets in question. The Plan says Delp may *keep* Delp IRA. Nu-Way was a "Plan creditor" [ ] on Plan confirmation day. The cumulation of all this is Nu-Way may not confiscate *Delp IRA* to collect its debt against Delp, *dischargeable or not*. This is the key.

Once the Plan was confirmed, by operation of law Delp IRA was "exempt" from prepetition creditors. "'The majority of courts...hold that a postpetition change in the character of property properly claimed as exempt will *not* change the status of that property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring postpetition can change that fact.' [*Citing Lowe v. Reed (In re Reed)*, 184 B.R. 733

(Bkrtcy. W.D. Tex. 1995)].....Exempt property is not liable for prepetition debt...." *In re Martin*, 269 B.R. 119, 122-23 (Bkrtcy. M.D. Pa. 2001) (emphasis added here; citations omitted). [n.22] The Plan had a *res judicata* effect against Nu-Way, defeating collection against Delp IRA, whatever it might consist of (assuming traceability and no commingling, neither of which is an issue in this case).

——footnote 22——

22 Bankruptcy "exemptions are generally construed broadly in favor of the debtor," *id.* at 121 (citations omitted). Bankruptcy law preempts state law to the contrary. *Cisneros v. Kim (In re Kim)*, 257 B.R. 680, 687; Bankr. L. Rep. (CCH) P78,365; 37 Bankr. Ct. Dec. 80 (9th Cir. Bkrtcy. App. 2000), *aff'd w/o opin.*, 35 Fed. Appx. 592 (9th Cir. 2002). *See also Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App.–Waco 2004, pet. denied) (following bankruptcy law). ——end footnote——

Nu-Way is the paradigm of a creditor bound by a plan under *res judicata*. It is *listed* as a creditor twice. Plan ¶¶ **1.02** & **1.26**. Nu-Way's claim is *provided for* under Class 9. Plan ¶ **4.09**. Nu-Way is "Associated" with the Plan drafter, Harvison. DX 17 ¶ **1.02**. While Nu-Way's motivation to participate as a creditor has not been expressed, by reasonable inference [n.23] it signed up for the Plan program because at that time it did not know whether it would ultimately become nonexempt or not. This is exactly the type of "hedge betting" conduct which motivated those earlier cited decisions to bind nondischargeable creditors to those plan terms they belatedly wish to skirt or shirk. A creditor participating in the bankruptcy case, and the plan, should not be released from those few exemptions which they left in favor of the debtor in that same plan. A creditor cannot profit from being (a) subject to the Plan *in part*, for its benefit, but simultaneously (b) "outside" it *in part* as to what it dislikes.

——footnote 23——

23 "When an appellate court reviews a finding of fact for legal sufficiency, it considers only the evidence and inferences that tend to support that finding, and disregards all of the contrary evidence and inferences." *Pace, supra*, 160 S.W.3d at 711(citations omitted). "An appellate court upholds a finding of fact if it is supported by more than a scintilla of evidence." *Id.* (citation omitted); *City of San Antonio v. TPLP Office Park Properties, Ltd.*, 155 S.W.3d 365, 373-74 (Tex. App.–San Antonio 2004, pet filed).

——end footnote——

Because [a] the Schedules, [b] the Plan, and [c] Nu-Way's Judgment all took place in federal bankruptcy court, federal *res judicata* law governs. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985); *Dallas Sales Co. v. Carlisle Silver Co., supra*, 134 S.W.3d 928, 931 (Tex. App.–Waco 2004, pet. denied); *Stewart v. Hardie*, 978 S.W.2d 203, 208 n.1 (Tex. App.–Fort Worth 1998, pet. denied). Federal res judicata operates as follows:

> Under *res judicata*, also known as claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). *Res judicata* "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication . . . not merely those that were adjudicated." *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 560 (5th Cir. 1983). Accordingly, "one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance them all at once on pain of bar." *Id.* For *res judicata* to apply, four elements must be satisfied:

> For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.
>
> *Intelogic Trace, Inc. v. Ernst & Young, LLP*, 200 F.3d 382, 386 (5th Cir. 2000) (quoting *Nilsen*, 701 F.2d at 559). All elements are satisfied , , ,, [*sic*]

Yazchi v. American Honda Finance Corp., No. 3:05-CV-0737-L; 2005 U.S. Dist. LEXIS 16669 at *5-6 (N.D. Tex. Aug. 12, 2005). *See also In re Coastline Care, Inc.*, 299 B.R. 373, 378 (Bkrtcy. E.D.N.C. 2003) ("a confirmed chapter 11 plan of reorganization operates as a final judgment with res judicata effect") (citations omitted).

Federal law is not notably distinguishable from Texas law on *res judicata*, at least a it relates to this litigation. *See, e.g., Jeanes, supra.* Texas law requires: (a) prior Judgment, (b) the same parties, and (c) issues were or could have been raised in the first case. *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 368 (Tex. App.–Fort Worth 2003, pet. denied). Delp's bankruptcy proceedings are therefore binding under *res judicata* because: (a) the determinations were final; (b) Nu-Way was a party both times; and (c) Nu-Way could have raised the complaints it now raises back then.

Against all this, Nu-Way says it *could not* have challenged the exemption because the FFRE transaction had not occurred when Schedule C was filed. This entirely misses the point. If there was nothing wrong with the exemption when it was filed, it immediately became *permanently* exempt (respecting *prepetition* debts). Therefore, it did not matter *what* Delp elected to do with his IRA money after it was scheduled. There is no constraint on

what a debtor may thereafter do with the property that has been accorded him. It was "his to keep," without further answering to any prepetition creditor about it. The effect of Nu-Way's admission that there was nothing by which it could then challenge Delp IRA's exemption simply acknowledges the propriety of Delp's listing that exemption. Practicably speaking, listing the asset exempt avoided the necessity for arguing with anyone about whether Delp IRA actually was exempt on that day.

Also, a *plethora* of cases hold creditors cannot collect on Plan exempted property:

a. *Christopher v. American Universal Insurance Group, Inc. (In re Christopher)*, 148 B.R. 832, 837-38 (*Bkrtcy. N.D. Tex.* 1992) ("A strong policy favors enforcement of the plan of reorganization because too many rights of too many interests have relied on the finality of the confirmation order. All questions which could have been raised are foreclosed by res judicata.");

b. *In re Rincon*, 133 B.R. 594, 596-98 (*Bkrtcy. N.D. Tex.* 1991) (though secured creditor suffered from an *unanticipated deficiency* in the collateral, no revision could be permitted following confirmation);

c. *In re McAfee*, 120 B.R. 76 (*Bkrtcy. N.D. Tex.* 1990) (even though confirmation of a plan is not *supposed* to release liability on a guaranty, the plan stated it *would*, and the plan prevailed over the Code);

d. *First Union Commercial Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996) ("Once a plan is confirmed, *neither a debtor nor a creditor* can assert rights that are inconsistent with its

provisions.") (emphasis added; cite omitted);

e. *Great Lakes Higher Education Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bkrtcy. 9th Cir. App. Panel 1998), *aff'd*, 193 F.3d 1083, 1086 (9th Cir. 1999) ("If a creditor fails to protect its interests by timely objecting to a plan..., 'it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code.' ... This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains *illegal* provisions.") (emphasis added; cite omitted);

f. *In re Black*, No. 92-00165-PHC-JMM, Chapter 12; 1998 Bankr. LEXIS 1665 at *41 (Bkrtcy. D. Az. Dec. 17, 1998) ("The IRS cannot assert rights that are inconsistent with the confirmed plan.") (emphasis added; citations omitted), *appeal denied*, Civil No. 99-0267-PHX-PGR; 2000 U.S. Dist. LEXIS 5880 at *21 (D. Az. March 30, 2000).

g. *Sosnowski v. Realtime Resolutions, Inc. (In re Sosnowski)*, 314 B.R. 23, 26-27 (Bkrtcy. D. Del. 2004) ("Absent timely appeal, the confirmed plan is *res judicata*.") *quoting* 5 *Collier on Bankruptcy*, P 1327.02[1] at 1327-3 (15th Rev. Ed. 2004) (Nu-Way, nor any Harvison interest, appealed the confirmation. Instead, they were its *proponents*.).

Nu-Way says it was hampered at the stage of proffering and confirmation by not knowing about the FFRE Transaction until after confirmation. This is quite misleading. Nu-Way had *already filed an adversary proceeding for nondischargeability* long prior to voting or receiving confirmation of *Harvison's* Plan. DAppx K. Even the *proofs of claim themselves* charged Delp with substantial malfeasance. DAppx I. Nu-Way obviously distrusted

Delp all along the way. It could *** have taken a Bankruptcy Rule 2004(a) [*sic*] [n.24] and/or adversary examination of the Debtor, Delp. Yet it nowhere advises that it did this, nor even attempted to do so, within the time frame leading up to Plan confirmation. If Nu-Way *was* ignorant, it was its own fault.

----footnote 24----

24 "On motion of any party in interest, the court may order the examination of any entity. ...The court may for cause shown and on terms as it may impose order the debtor to be examined."

----end footnote----

Regardless, ignorance is *never* a defense to enforceability of a Plan term:

> The court cannot allow the facts of a particular case, however appealing, to sway it from the path along which the law directs it....[T]he court holds that all preconfirmation claims of AUIC, the Sequa Group and the RHI Group are discharged except to the extent to which the plan provides....Appellant emphasizes these harsh facts. 'We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.' *FCC v. Woko, Inc.*, 329 U.S. 223, 229 (1946)....Despite the *misleading actions*, inadvertent or intentional, of debtor Alton, the time specifications set out in the Bankruptcy Code are sufficiently clear to have *placed an obligation on creditor Byrd to follow the case and to take the timely action necessary to pursue his claim.*"

Christopher, supra, 148 B.R. at 838 & n. 12 (emphasis added; some citations omitted).

Nu-Way is the one who is misleading. *There was nothing*

wrong with the FFRE Transaction when it occurred, insofar as Delp's bankruptcy was concerned. Delp IRA *was exempt* on petition day. There being no nondischargeable judgments pending when the FFRE Transaction occurred, and no way to know there *would* be, Delp IRA remained as exempt on the day following FFRE as on the day before, *as respects prepetition creditors*.

Proceeds of property exempt from bankruptcy creditors as of the petition are themselves also so exempt as to those prepetition creditors. *See Reed*, 184 B.R. 733, *supra*. Having no reason to know why he could not do as he wished with his own exempt assets, he certainly had no duty to Nu-Way, Harvison, or any other bankruptcy personage to notify them about the conversion of cash in his IRA into the assets obtained in the FFRE Transaction. Nu-Way could not have been adversely affected by its ignorance because there was nothing for Delp to reveal. Nu-Way could not have been harmed because it could not have had any access to Delp IRA before or after FFRE. *Tax* consequences, if any *arguendo*, which is denied, are irrelevant as affects Nu-Way.

Beyond all this is the determinative finality given to confirmation orders. The bankruptcy context explains this. With a plan, creditors have interrelated claims and interests. However, they also have conflicting ones. It is not simply a creditor/debtor tension. *Many* interests are at stake. Only very rarely can a creditor be allowed to take action contrary to the provisions of a plan. This is a lynchpin of the bankruptcy system. Bankruptcies could not operate if parties could continue investigation and reopen the case years later. *Cf. Coastline*, *supra*, 299 B.R. at 378 (Bkrtcy. E.D.N.C. 2003) ("a confirmed plan should, insofar as possible, be a final determination of the rights of all parties.").

"Courts apply the rules of contract interpretation to the interpretation of a reorganization plan." *In re Rincon*, *supra*, 133 B.R. at 596 (citation omitted). "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of

the parties." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984).

Further, a reading of a contract which makes any term meaningless or "absurd" is to be avoided. *See Karen Corp., supra*, 107 S.W.3d at 123, *citing Temple-Eastex, supra*, 672 S.W.2d at 798; *Pratt-Shaw, supra*, 122 S.W.3d at 829; *cf. Continental Casualty Co. v. Warren*, 152 Tex. 164, 171; 254 S.W.2d 762, 765 (1953) ("If a construction of non-liability under one part of a contract would operate to produce an absurd result from the contract as a whole, that fact has clear logical relevance to whether the construction should or should not be adopted."). If Nu-Way says the Plan language only meant Delp could retain whatever *actually* was exempt, as opposed to what was *scheduled* as exempt, it would obviously give Delp *nothing*. A different, *reasonable* construction is preferable over "only actually exempt at this moment." Further: "Language used by parties in a contract should be accorded its plain, grammatical meaning . . .." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985); *Pratt-Shaw, supra*, 122 S.W.3d at 829.

The applicable term reads, in relevant part here:

> 4.10 Class 10 consists of the interest of the Debtor and the Debtor's spouse and is impaired under Harvison's Plan. The Debtor and the Debtor's spouse shall be entitled to <u>*retain*</u> their homestead . . . and their personal property <u>*scheduled*</u> as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities. [Emphasis added.]

DAppx M. There are two operative terms. The first is: "retain." *Retain* is defined: "to keep in possession or use; ... to hold secure or intact"; *syn* see KEEP." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Springfield Mass. 1987) at 1006. Thus, Delp IRA is not something the bankruptcy creditors could access to collect on their claims, because Delp may "keep" it. The

second key term is "scheduled." *Scheduled* means: "a written or printed list, catalog, or inventory." *Webster's, supra*, at 1050. ¶ 4.10 of the Plan therefore refers to what is *written down* in the *list* under *Schedule "C."* No terms oblige the list to be *correct*. No term says: "Only if it remains exempt *under State or tax rules applicable to IRA's.*" "No other words are to be added to or subtracted from the written instrument." *Gibson v. Turner*, 156 Tex. 289, 297; 294 S.W.2d 781 (1956) (cite omitted).

The Plan expressly provided and allowed Delp to keep what he listed as exempt in Schedule C, regardless any "actual" exempt status. Read this way, the provision is not superfluous or meaningless, as it would be under Nu-Way's interpretation. It allows Delp to keep certain property *specifically without* the necessity of "proving" or "evaluating" whether such items would otherwise be "actually" available to creditors or not. It is the same situation as traditionally followed in settlements of most lawsuits, *e.g.*: "Without admitting any liability and to avoid the necessity of ascertaining it." If [a] it is on that list, [2] Delp can keep it, [3] Delp IRA *is* on the list, so [4] Nu-Way cannot collect from it. *Res judicata* therefore avoids and precludes Nu-Way now seeking collection against Delp IRA.

* * * [Argument sub-b regarding effect of intervening State Court Judgment omitted as irrelevant here.]

2. *By Waiver.*

Texas cases apply *waiver* to preclude legal proceedings on repetitive claims. *ASI Technologies, Inc. v. Johnson Equipment Co.*, 75 S.W.3d 545 (Tex. App.–San Antonio 2002, review denied); *American Fracmaster, Ltd. v. Richardson*, 71 S.W.3d 381 (Tex. App.–Tyler 2001, (judgment vacated due to settlement). "[W]aiver principles come into play [because waiver] applies in the bankruptcy context." *Varat, supra*, 81 F.3d at 1317 (4th Cir. 1996).

Waiver is the intentional relinquishment of a known right.

Tenneco Inc. v. Enterprise Products Co., 925 S.W.2d 640, 643 (Tex. 1996); *Comsys Information Technology Servicers, Inc. v. Twin City [F]ire Insurance Co.*, 130 S.W.3d 181, 189-90 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). "'Intention' to waive may be either expressly made or inferred from intentional conduct that is inconsistent with an intent to claim the right. *Id*[.]; *American Fracmaster, Ltd. v. Richardson, supra.* The Harvison Plan was known to all creditors as a matter of law. [n.27] Moreover, it was *actually* known to *Nu-Way*, listed in the Plan as part of the "*Associated Group*" and the "*Related Entities*" affiliated with Harvison, the Plan drafter. Plan, **¶¶ 1.02, 1.26, 4.09**; DX 17. Nu-Way is *still* represented by the same *counsel* representing Nu-Way during Delp's Chapter 11. Knowledge to the client can be imputed on that basis:

> [A]n attorney's actual notice of the pendency of a bankruptcy may be imputed to his client .... While it has not been specified ... that Mrs. Patricia Thompson was Thompson's counsel for his possible claim against Debtor when she learned of Debtor's bankruptcy, that can be inferred from the fact that she represents Thompson in the instant proceedings.

In re Marino, supra, 195 B.R. at 895 (citations omitted).

——footnote 27——

27 *In re Marino*, 195 B.R. 886, 893 (Bkrtcy. N.D. Ill. 1996); *Cf. County of Camden v. Farris*, Civil Action No. 97-3297, Civil Action No. 97-5069 & No. 97-3297; 1998 U.S. Dist. LEXIS 22441 at *13 (and *passim*) (D.N.J. June 29, 1998) (Bankruptcy notice provisions are "not intended as a safe haven for creditors with actual knowledge of a pending bankruptcy case who neglect to properly evaluate and advance their interests in the case.") (emphasis added; citation omitted).

——end footnote——

Upon "notice of the pendency of a bankruptcy case, the creditor-claimant has the clear obligation to take affirmative steps to evaluate, advance, and protect its rights." *Farris, supra,* 1998 U.S. Dist. LEXIS 22441 at *21 (citation omitted). "[T]he creditor had more than ample time to generate evidence of this sort and had not done so." *Id.* at *20 (cite omitted). Nu-Way certainly knew more than the creditor found barred in *Farris*. Even to whatever extent Nu-Way *was* legitimately ignorant, bankruptcy law unequivocally imposes the burden of discovery on the *creditors*. *Farris, supra*. Therefore, Nu-Way waived any objection it may have had to Delp IRA's being exempt from Nu-Way's collection efforts.

In light of the foregoing, the particular acts and omissions demonstrating wavier here include, *inter alia*: (a) filing proofs of claims, PAppx I; (b) listing itself as a creditor in two sections of the Plan, *id.* M; (c) having itself freed up, as a practical matter, from litigation pending by Delp, *id.* M; and (d) placing itself in line for *payment* under the plan. These clearly are more than enough, conjoined, to be seeking treatment under the Plan, which in turn establishes waiver of any right of seeking collection which is inconsistent with the Plan. In other words, Nu-Way is thus barred by direct action of the law under *res judicata* from Schedule C assets. Alternatively, Nu-Way gave every indication that it was forfeiting (waiving) any right to treatment on a nondischargeable basis to obtain what was available to creditors generally under the Plan. The motivation, by inference but without doubt, was that it did not know if it would become nondischargeable when the Plan was being crafted, and it did not want to lose out altogether.

A would-be nondischargeable creditor must make an election. It may have (arguendo only) a right to "opt out" of a plan. If it may and does elect out (arguendo only), it is freed up from plan restrictions, but gets none of its benefits.. But it *cannot* do *both*. Nu-Way elected to go under the Plan. Therefore, it is bound by the Plan's exemption of Schedule "C." [n.28]

——footnote 28——

28 Analogous are class actions, getting part of the recovery if in, but on your own if out.

——end footnote——

3. *By Settlement & Release.*

The Harvison Plan constituted a "settlement and release." It culminated all creditors' rights against the debtor, and vice versa.:

> [T]he terms of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan....[T]his court will not authorize [the creditor] to take an action inconsistent with the plan's provisions.

Sosnowski, supra, 314 B.R. at 26-27. The Plan's broad language is *inclusive*, not exclusive:

> [A] broadly worded release is to avoid the risk of encountering such interpretative principles as *ejusdem generis* by enumerating claims to be released[,] at least when the parties were buying complete peace.

Shelton v. Exxon Corp., 921 F.2d 595, 602 (5th Cir. 1991) (Texas law) (citation omitted).

Instruments severing parties' relationships are given a broad construction. *Id.* So strong is the public policy in favor of settlements in Texas that the Supreme Court has held even *fraudulent inducement* claims *in negotiating the settlement itself* may be released in a settlement, if it is (a) between sophisticated

businessmen, (b) ends the parties' joint efforts, and (c) is in an antagonistic setting:

> Because the parties were attempting to put an end to their deal, and had become embroiled in a dispute over the feasibility and value of the project, we conclude that the disclaimer of reliance the Swansons gave conclusively negates the element of reliance.
>
> In negotiating the release, highly competent and able legal counsel represented both parties and, as we have said above, the parties were dealing at arm's length. Further, both Schlumberger and the Swansons were knowledgeable and sophisticated business players.

Schlumberger Technology v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997).

It is difficult to conceive a more litigious, rancorous, relationship-terminating context than jockeying for opposing plans in bankruptcy. Add to that mix that the two proponents are the Debtor and his arch rival. Therefore, even had there been less than full disclosure by Delp of the FFRE Transaction, this could not avoid the Plan. The Harvison Plan simply cannot be set aside for *fraudulent inducement* (were there any, which there was not) under *Schlumberger*. Also, it is interesting that Nu-Way nowhere (to Delp's observation) elucidates what it was it would have done *differently* had it so known. Thus, no detrimental reliance.

"Parties should be able to rely on the finality of freely bargained agreements." *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 292 (Tex. App.–Fort Worth 1992, writ denied). It was *Nu-Way's* "burden of proving that the release should be set aside." *Id.* at 291. Just because pertinent facts may be *unknown*, or *not revealed*, does not of itself constitute any ground for setting aside a release. "[T]he doctrine of mutual mistake does not prevent a

party to a release from deliberately assuming the risk of future, unknown injuries." *Sweeney, supra*, 824 S.W.2d 289, 292. "[T]he doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain." *Id.*

Harvison made a calculated decision. He allowed Delp to retain a handful of delineated items (which he believed Delp was allowed to retain by law anyway) [n.29], while Harvison obtained the right to raid *all* of Delp's other assets. Which he did. Having reaped the benefits of the provisions in his favor, it is time now for Harvison to allow Delp to keep what he expressly said Delp could keep–*Delp IRA*, as part and parcel of the parties' global *settlement and release*. This is regardless whether Delp IRA is "exempt" under (1) State law, or (2) tax law, or (3) as to anybody else other than the Plan creditors.. [*sic*] *Nu-Way*, regardless anybody else, cannot attach Delp IRA assets to satisfy its nondischargeable debt.

——footnote 29——

29 This term was, nonetheless, negotiated in the sense that the Plan *could* override the Code, and *did* so (*as to Delp's wife*). *In re McAfee*, 120 B.R. 76 (*Bkrtcy. N.D. Tex.* 1990) (plan not allowed to release liability on a guaranty, but the plan stated it *would*–the Plan provision prevailed).

——end footnote——

4. *By Quasi-Estoppel.*

Chapter 11 proceedings are an avenue whereby a debtor has the opportunity to *restructure* his debts, and move back into a productive environment. This did not happen here. Instead, Harvison's "Associated Group"–including Nu-Way–advanced tactics to arrange Delp's case for their own benefit. They drafted a Chapter 11 plan, ultimately confirmed. DX 17-19. Harvison's Plan provided for Delp to have *nothing* but the listed Scheduled C properties. Having gained all the advantages under his Plan, Harvison cannot come back and argue a *contrary* position to that

provided in the Plan in an effort to fleece Delp of his exemptions to gain an additional, inconsistent advantage. *Enochs v. Brown*, 872 S.W.2d 312 , 317 (Tex. App.–Austin 1994, no writ) (applying this rule of quasi-estoppel).

Quasi-estoppel can stop someone from taking an inconsistent position even if the second position is the *legally correct one* (though here it is not). *See, e.g.*:

> A division of marital property in payments over time will not be declared nondischargeable in bankruptcy merely because the parties have labeled it "alimony." . . . *Benich*, 811 F.2d at 945 . . ..
>
> Our holding in *Benich*, however, does not negate the doctrine of estoppel. We . . . hold that Mr. Davidson is estopped from claiming that his payment obligations to Mrs. Davidson are not in the nature of alimony when he....treated the payments as alimony for tax purposes.
>
> *** "[Q]uasi estoppel" forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects. Mr. Davidson has accepted the benefits of his agreement: He has taken tax deductions for the payments to Mrs. Davidson. He now tries to escape the bankruptcy effects of his election. . . .
>
> To allow a spouse to set up an intricate and unambiguous divorce settlement, carefully distinguishing certain periodic payments, called alimony, from the division of marital property, and consistently taking advantage of this characterization for tax purposes, only then to

> declare that the payments truly represented a division of property, would be a legal affront to both the bankruptcy and tax codes. . . . That Mr. Davidson did not know he would go broke when he agreed to the divorce settlement is not an uncommon scenario, but [is] no excuse for discharging [what] he chose to characterize as alimony.

In re Davidson, 947 F.2d 1294, 1296-97 (5th Cir. 1991) (cites and footnotes omitted). *Accord, Missouri Pacific Railroad Co. v. Harbison-Fischer Manufacturing Co.*, 26 F.3d 531, 537 (5th Cir. 1994) (under Texas law) ("what would otherwise be an unquestioned right"). Nu-Way cannot (a) take advantage of being treated as a Plan creditor for its terms to its benefit (or expected benefit [n.30]) but (b) claim that it is *not subject* to the Plan, as being a nondischargeable creditor, when its comes to Delp's benefitting from his exempt property.

——footnote 30——

30 "Despite Fru-Con's contentions ..., the minor stock interest in EA-K was not entirely without value. The parties agreed to negotiate in good faith for a term in the proposed Shareholder's Agreement providing that as long as B+B or Fru-Con retained an ownership interest in EA-K, Fru-Con would have exclusive rights to K-Fuel contracts. Fru-Con's minor stock interest in EA-K *could therefore have resulted* in a very lucrative, exclusive deal for Fru-Con *had things gone as planned*. In return for agreeing to provide the Bridge Loan work, Fru-Con received the benefit of the prospect of exclusive rights to K-Fuel contracts. This expectancy constitutes sufficient consideration to establish a binding legal agreement." *Fru-Con Construction Corp. v. KFX, Inc.*, 153 F.3d 1150, 1159 (10th Cir. 1998) (emphasis added). Delp admits he made no *payment*," Stip. ¶ 24), but not that Nu-Way failed to *benefit* from an *expectancy*.

——end footnote——

"[A] creditor cannot both accept the benefits of a Settlement Agreement and thereafter object to the exemptions that the Settlement Agreement grants the debtor." *Rice, supra*, 1999 U.S. Dist. LEXIS 21229 at *29. Regardless whether the law actually is that a nondischargeable creditor is free from bankruptcy plan constraints, Nu-Way acted as if it *was* so bound *for potential Plan benefits*. It cannot now claim it is *not* bound to the Plan's exemption clause to incongruously get Delp IRA too in the face of the Plan's express prohibition, when the Harvison Group benefitted, as a matter of *law*, from the Plan's terms.

5. *By Enforcement of the Plan Contract.*

"The Joint Plan is a binding and enforceable contract. *In re Page*, 118 B.R. 456, 460 (Bankr. N.D. Tex. 1990). 'In essence, the plan becomes a binding contract between the debtor and the creditors and controls their rights and obligations.' *Id.* 'The provisions of a confirmed plan bind the debtor...and any creditor...whether or not the claim or interest of such creditor...is impaired under the plan and whether or not such creditor...has accepted the plan.' 11 U.S.C. § 1141." *National Gypsum Co. v. Prostok*, 2000 U.S. Dist. LEXIS 16174 at *47 (N.D. Tex. 2000) (citations omitted). "[A] plan of reorganization acts like a contract that is binding on all of the parties, debtor and creditors alike." *Varat, supra*, 81 F.3d at 1317. Delp has the right under the Plan contract to enforce Delp IRA's exemption.

Nu-Way is breaching the Plan contract by attempting to recover Delp IRA assets to collect on Delp's debt to Nu-Way when the Plan says Delp can keep those assets:

> ¶ 4.10 Class 10 consists of the interest of the Debtor ... and is impaired under Harvison's Plan. The Debtor and the Debtor's spouse shall be entitled to *retain* their homestead . . . and their personal property *scheduled* as *exempt* under Schedule C of the Debtor's Schedules of Assets and Liabilities.

DX 17. "Courts apply the rules of contract interpretation to the interpretation of a reorganization plan." *Varat, supra*, 81 F.3d at 1317 (citation omitted). "Language used by parties in a contract should be accorded its plain, grammatical meaning...." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). "*Retain*" is defined as: "to keep." Simply stated: "Creditors may not obtain Delp IRA property from Delp to satisfy their claims against Delp." So the question is not what **¶ 4.10** *means*, but whether this clause *applies to Nu-Way*.

It does. Nu-Way made itself a creditor under the Plan. The Plan does not except out nondischargeable creditors. It could have done so. By Harvison wording the clause as he did, Nu-Way does not have any basis for denying its application to Nu-Way. Even were there any ambiguity inferred, which would have to be solely due to Nu-Way's *retroactive* status as nondischargeable, this would make the Plan's scope at worst ambiguous. Then the plan would be construed against the drafter, Harvison (Nu-Way). The rules of contract construction, placed in the bankruptcy context, show no exclusion of any creditor was intended respecting assets which were a were [*sic*] or were not open to collection.

* * * [Various State-law issue discussion omitted.]

I. THE AWARD OF ATTORNEYS' FEES SHOULD BE AFFIRMED.

1. *Effect of Award in the Alternative.*

Nu-Way did not move that Delp elect between his avenues of recovery. "[W]here the prevailing party fails to elect between alternative measures of damages the court should utilize the findings affording the greater recovery and render judgment accordingly." *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 367 (Tex. 1987); *followed, Lesikar v. Rappeport*, 33 S.W.3d 282, 304 (Tex. App.–Texarkana 2000, pet. denied). Thus, the judgment award should be upheld if it can be sustained on any

ground in the record.

2. *Under Bankruptcy Law.*

Nu-Way has been violating federal bankruptcy law at all pertinent times and continues to do so now. Therefore, federal bankruptcy law governs. *See* art. I, § 8 and art. VI of the UNITED STATES CONSTITUTION (Congressional power over Bankruptcy, and the Supremacy Clause). Because bankruptcy law establishes the ground of *liability*, it provides the *remedies* as well. *See, e.g.*, this Court's decision in *Dallas Sales v. Carlisle Silver, supra*, where the Court "agree[d] ... that federal law should apply here because the prior proceeding was in bankruptcy court." 134 S.W.3d at 931. *Accord, DiStefano v. Stern (J.F.D. Enterprises, Inc.)* 223 B.R. 610, 620; 33 Bank. Ct. Dec. 114 (Bkrtcy. D. Mass. 1998) ("[T]he document before the Court is a stipulation submitted in a bankruptcy case. Thus, federal common law, rather than state law, is controlling."); *Lane v. Lane (In re Lane)*, 267 B.R. 679, 684 (Bkrtcy. D. Del. 2001) ("notwithstanding a finding by the *state* court that an award is not supported, the bankruptcy court is required to apply '*federal common law*'") (emph. added).

Looking to those *remedies* decisions, then, bankruptcy courts have imposed *stiff penalties* on creditors for straying from confirmed plans in overzealous collection efforts. Included are actual damages, exemplary damages, and attorneys' fees. *See, e.g.*:

> "Because creditors are limited to those rights that they are afforded by the plan, **they may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan.**" 8 Collier on Bankruptcy, P1327.02[1][b] . . .. [P]ost-confirmation creditors "may not later assert any interest other than that provided for it by the confirmed plan." ... Accordingly, [the IRS/creditor] acted in contempt of the confirmation order when it withheld estate

property without any right to do so.

> We find that the IRS' V-freeze violated §§ 362(a)(3) and (6), and that the V-freeze as instituted was [and] is *in contempt of Debtors' Chapter 13 Plan Confirmation Order.* . . . Debtors are entitled to $1000 in general damages and $7000 in emotional damages, as well as $12,500 in attorneys fees.

Holden v. United States (In re Holden), 236 B.R. 156, 166-67 (Bkrtcy. D. Vt. 1999) ("*Holden 1*") (emphasis added; citations omitted); *aff'd*, 258 B.R. 323 (D. Vt. 2000). ("*Holden 2*"). This Court should affirm the recovery provided for in the Amended Final Judgment as being either "general damages" or "attorneys fees" accrued in defense against Nu-Way's ongoing violation of the Plan and the Confirmation Order, whichever provides the greatest recovery. [n.35]

——footnote 35——

35 Another reason the Court should follow bankruptcy law is the *direct force* of the federal law as distinct from, and alternatively to, such personal defenses as res judicata or breach of contract. *See Maryland v. Antonelli Creditors' Liquidating Trust, supra*,123 F.3d 777, 781; 31 Bankr. Ct. Dec. 475 (4th Cir. 1997).

——end footnote——

3. *Under the Declaratory Judgment Act.*

Nu-Way initiated this action, seeking, *inter alia*, (a) declaratory relief (b) [ ] *with attorneys' fees*. CR 2 203-205. Alternatively and certainly, then, attorneys' fees could have been and were properly awarded to *Delp* (or his *interests, infra*) in the Trial Court's *discretion*, in that, among other things, Delp *prevailed* and Nu-Way *lost*. *Falls County v. Perkins and Cullum*, 798 S.W.2d 868, 871 (Tex. App.–Fort Worth 1990, no writ);

Accord, Ritchie v. City of Fort Worth, 730 S.W.2d 448, 451 (Tex. App.–Fort Worth 1987, writ ref'd n.r.e.).

Nu-Way cost Delp *hundreds of thousands of dollars* incurred to ward off Nu-Way's never-ending wrongful efforts at collection against Delp's bankruptcy-exempt assets per the Bankruptcy Plan. Delp's ultimate vindication now on the merits warrants reimbursement. Trial courts may award attorney fees under the Declaratory Judgment Act in their discretion. Texas Business & Commerce Code § 37.009. There was no abuse of discretion. *Santa Fe Petroleum, L.L.C. v. Star Canyon Corp.*, 156 S.W.3d 630, 641-42 (Tex. App.–Tyler 2004, no pet.). The damages/fees judgment may be affirmed on this ground even standing alone.

4. *For Breach of Contract.*

The Plan is a contract. *Varat, supra*, 81 F.3d at 1317. Nu-Way *breached* it by engaging in collection efforts aimed at assets of Delp IRA when it expressly agreed to not do so. "When a prevailing party in a breach of contract suit seeks attorney's fees, an award of reasonable fees is mandatory under § 38.001." *World Help v. Leisure Lifestyles*, 977 S.W.2d 662, 683 (Tex. App.– Fort Worth 1998, pet. denied). The fees should be affirmed.

5. *Proper Recipient of Attorneys' Fee Award and No Offset.*

A party must not be allowed to profit from its own wrong. By directing its fee award as it did, the trial court avoided that. So also should this Honorable Court. If Nu-Way is permitted an offset here, it will basically defeat any benefit from resisting Nu-Way's wrongful efforts to deplete the exempt property by having to use those very selfsame assets to support that defense. At the least, as an equitable matter under the Declaratory Judgment Act the Trial Court properly used its discretionary authority to defeat a travesty of justice.

Alternatively, *federal* law governs the fee award because of Nu-Way's bankruptcy law violations. *Dallas Sales v. Carlisle Silver, supra* ("federal law should apply here because the prior proceeding was in bankruptcy court"). 134 S.W.3d at 931. [n.36] Delp relies on *Marre v. HP-84 Nursery Associates, Inc.*, 117 F.3d 297, 303; 97-2 U.S. Tax Cas. (CCH) P50,573; 80 A.F.T.R.2d (RIA) 5523 (5th Cir. 1997) as informative of federal common law and instructive:

> Under the statute, if the court decides to award attorneys' fees to the prevailing party, the fees are to be awarded *in addition to*...damages....
>
> In other words, the attorneys' fees are not awarded out of the prevailing party's damages, but [above] damages the prevailing party receives.
>
> [D]amages and attorneys' fees are separate awards, the former going to the prevailing party and the *latter to the prevailing party's attorneys*.
>
> In this case, because the attorneys' fees awarded under section 7430 belong to Urquhart & Hassell, and not Marre, the government cannot set off Marre's tax obligations against the attorneys' fees award, as no mutuality of debt exists between the government and Marre's attorneys.
>
> That the statute provides that attorneys' fees are to be awarded to the prevailing party is not controlling. The issue "is not whether plaintiff is *nominally to receive* the money but whether *ultimately it is to go to her attorney* or to be credited toward defendant....."
>
> Here, the prevailing party is only *nominally* the person who receives the award; the real party in interest vis-a-vis attorneys' fees awarded under

the statute are the attorneys themselves. [*Id.* at 303-308 (emphasis added; citations omitted).]

——footnote 36——

Cf. Union Pacific Railroad Co. v. Williams, 85 S.W.3d 162, 170 (Tex. 2002) (preemption); *In re MAP 1978 Drilling Partnership*, 95 B.R. 432, 435 (Bkrtcy. N.D. Tex. 1989) (state law contrary to bankruptcy law is invalid); *Volkswagen of America, Inc. v. Dan Hixson Chevrolet Co.*, 12 B.R. 917, 924 (Bkrtcy. N.D. Tex. 1981) (state law which "would frustrate the purposes of federal bankruptcy laws" must yield). To the extent of any contradiction, federal law must control.

——end footnote——

Here, Nu-Way's principal sponsored a Plan. By joining in the Harvison groups, Nu-Way effectively opted to proceed under the Plan to the extent of matters reached by the Plan. It agreed not to recover from debtor's Schedule C properties. *Later*, that debt became nondischargeable. But this cannot *retroactively* recall Nu-Way's consent to what it had *already agreed to* in the Plan concerning which assets it could pursue, nondischargeable or not. To allow such reconsideration would lead to sharp practices and total confusion of creditors and debtors. That is the exact opposite of what the multiple authorities *supra* say *should* attend the confirmation of a plan. It would create *uncertainty* instead of certainty.

An award of attorneys fees' to debtors in such instances is entirely consistent with bankruptcy case law. Bankruptcy courts have ruled that fees from such conduct fall within various "exceptions" to the so-called "American Rule" (*i.e.*, no fee shifting absent statute or contract). Two exceptions are: "the losing party acts 'in bad faith, vexatiously, wantonly, or for oppressive reasons'; [or] the defendant willfully disobeyed a court order." *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001, 1010 (N.D. Ill. 1992) (citation omitted) (bankruptcy court listed avenues the creditor

was free to have pursued, but nonetheless awarded sanctions with fees based on the creditor taking a step which was *not* permitted.).

"[B]ankruptcy courts have properly awarded attorney's fees against a party that violates the permanent discharge injunction." *Thomas v. RTC (In re Thomas)*, 184 B.R. 237, 242 (Bkrtcy. M.D.N.C. 1995) (citations omitted). *See also Walker v. M&M Dodge, Inc. (In re Walker)*, 180 B.R. 834, 849 & n.29 (Bkrtcy. W.D. La. 1995) (citing cases and awarding fees "for a violation of the post-discharge injunction").

Delp further submits his attorney fee award should not be set off against Nu-Way's Judgment because Delp's fees requested in this case were not incurred by Delp to obtain an <u>independent recovery</u> against Nu-Way. Instead, Delp has simply been trying to *protect and defend his IRA*. Certainly it makes sense where one party advances an *affirmative claim* and obtains an award, that this award should be offset with another judgment the opposing party has already obtained against the first party. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 469 (Tex. 1995). But this is not such an occasion. Nu-Way may continue to seek collection of its judgment as it pleases. However, the Harvison Plan determined certain property would be immune from such forays. Nu-Way selected that very property to attach.

If Delp is not allowed to keep the fees (to be deposited in the exempt Delp IRA earmarked for payment of fees), Nu-Way will have been permitted to drain the assets it had agreed to let Delp keep. It will have done precisely what it agreed not to do. It would ring hollow for Delp to have successfully defended against a takeover of his exempt assets which he is manifestly entitled to retain for himself, yet only to have *those exempt assets decimated* by having to delve into them to pay for the *defense* against Nu-Way's nefarious "raiding." This would be totally inequitable in law and in fact. Such a result should not obtain.

<u>CONCLUSION & PRAYER FOR RELIEF</u>

"As the creditors...could not have the property levied on, or in any way subject it to the payment of the Judgments, it is difficult to see how they have any right to object, as creditors of the owner, to his dealing with it as he pleases." *McCarty v. Coffin*, 150 F. 307, 311 (5th Cir. 1907) (citation omitted). It was Delp's right to choose what to do with Delp IRA assets once they became exempt in bankruptcy. Even nondischargeable creditors (and Nu-Way did not know it would be such when the plan was confirmed) cannot collect contrary to the terms of the plan, and particularly so in Nu-Way's case as an active participant in the bankruptcy and plan proceedings. Only *post*-petition creditors, not *pre*petition creditors, can collect against Delp IRA. The Judgment should be **AFFIRMED**.

Respectfully submitted,

/s/Mack Ed Swindle
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THOMAS F. HARKINS, JR.
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* * * [Omit Firm Identification]

ATTORNEYS FOR DEFENDANT/ APPELLEE DELP

* * * [Omit Certificate of Service, September 6, 2005, signed by Thomas F. Harkins, Jr.]

9 Extracts from Appellee's [Petitioner Delp's] Supplemental Sur-Reply Brief to Waco Court of Appeals:

NO. 10-05-00065-CV

IN THE COURT OF APPEALS
FOR THE TENTH JUDICIAL DISTRICT OF TEXAS
AT WACO

NU-WAY ENERGY CORPORATION,

Plaintiff/Appellant.

v.

BILLY R. DELP, JR.

Defendant/Appellee.

ON APPEAL FROM THE 96TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS
CAUSE NO. 96-183839-00

APPELLEE'S SUPPLEMENTAL SUR-REPLY BRIEF
[Local Rule 13(e)]

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* * * [Omits other formal portions and Tables.]

ISSUES PRESENTED

[In Response to Issues Raised in Appellant's Reply Brief]

* * * [Mootness issue omitted.]

2. Should the Court look to foreign authorities absent Texas precedent?

3. Does the Bankruptcy Code prohibit provisions in a Chapter 11 Plan which voluntarily modify rights

of nondischargeable creditors (so long as they do not affect the nondischargeability of the debt itself)?

4. Did Nu-Way receive any consideration to be bound to the Plan?

* * * [State Court Judgment issue omitted.]

6. Does the grant of affirmative relief in the 1998 Judgment to Delp IRA preclude Nu-Way from now charging that there was a 1992 transaction prohibited by tax law?

7. Is there a *good faith* requirement for debtors' maintenance of exemptions?

8. Did Delp have an obligation to keep his bankruptcy creditors up to date on what he did with his assets which were exempt at the time?

9. When a creditor and a debtor reach an agreement that the creditor will set aside a certain asset from his collection efforts, but the creditor nonetheless sues to attach that asset, should an award of resulting attorneys' fees to the debtor (or his interests) be set off against the creditor's debt, thereby destroying the debtor's excepted-asset regardless?

ARGUMENT

* * * [Mootness issue omitted.]

B. BETTER AUTHORITIES HOLD PLAN CAN AFFECT COLLECTION OF NONDISCHARGEABLE DEBTS.

In surreply to Argument II.B of the ARB, bankruptcy case law is unsettled regarding the effect of a Chapter 11 plan on nondischargeable creditors. However, there are no decisions from the United States Supreme Court or the Texas Supreme Court. [n.1] This Court is not bound to follow (or reject) any foreign cases. *Cf. WarnerVision Entertainment Inc. v. Empire of Carolina Inc.*, 919 F. Supp. 717, 721 (S.D.N.Y. 1996) ("I am not bound by these rulings and respectfully decline to follow them.").

——footnote 1——

1 Appellant seeks to distinguish *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). ARB 5. Appellant circumvents *Taylor* by restricting it to instances where the debtor *improperly* claims an exemption, which would give *more* rights to *malfeasors* than *honest debtors*. *Taylor* does *not* address the effect of a Chapter 11 plan on nondischargeable creditors, the primary issue here.

——end footnote——

The rule for Texas intermediate appellate courts considering foreign authorities was declared in *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993): "While Texas courts may certainly draw upon the precedents of the Fifth Circuit, *or any other federal or state court*, in determining the appropriate federal rule of decision, they are *obligated* to follow *only* higher Texas courts and the United States Supreme Court." (emphasis added; citations omitted). *Penrod Drilling* was *followed* by this Court in *Lattin v. Barrett*, 154 S.W.3d 169, 179-80 (Tex. App.–Waco 2004, no pet.); *cf. Byrd v. Estate of Nelms*, 154 S.W.3d 149, 163 (Tex. App.–Waco 2004, pet. denied) ("finding no precedent in Texas on the issue at hand, we look to other jurisdictions for guidance. . . .").

That said, the Texas Supreme Court *has* provided *guidance*. Delp's argues a party cannot embrace favorable positions of a contract (Plan) only to challenge the contract's viability as affects *itself* thereafter. In *In re Weekley Homes, L.P.*,

49 Tex. Sup. J. 55; 2005 Tex. LEXIS 817 at *21 (Oct. 28, 2005) (orig. proceeding), the Court held: "A nonparty cannot have his contract and defeat it too." Nu-Way *wrote* the bankruptcy Plan, and benefitted therefrom (through its privies, Harvison, et al., if not otherwise). Nu-Way cannot now claim the Plan is inefficacious regarding provisions *applicable to itself.*

Further, this case is governed by *statute*. Case law which does not follow the actual language of the provision is unfounded. *Compare WarnerVision, supra*, 919 F. Supp. at 721 ("[T]his practice has no basis in the text or legislative history"). 11 U.S.C. § 1141(d)(2). The statute reads, in pertinent part: "The confirmation of a plan does not discharge an individual debtor from any debt exempt from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2) (DAppx 3) (emphasis added). In statutory construction endeavors the *plain language* controls. *Olivares v. Birdie L. Trust*, 126 S.W.3d 242, 248 (Tex. App.–San Antonio 2003, pet. denied), *cert. denied*, -U.S.-; 125 S. Ct. 91 (2004). Some constraints on the nondischargeable creditor *are* permitted. It is the "debt" itself which cannot be "discharged." If there is a dollar debt, the plan cannot knock off five cents, because that would be "discharging" the debt to that extent. But it can say, "Don't collect that dollar from his IRA." This is the crux of this appeal.

Nu-Way posits that virtually all case law holds to "no restrictions." This is just false. There is a *broad disagreement* whether nondischargeable creditors can be affected by Chapter 11 Plans. These include "published opinions" on both sides. *See, e.g., In re Howell*, 84 B.R. 834 (Bkrtcy. M.D. Fla. 1988), and *Dolven v. Bartleson (In re Bartleson)*, 253 B.R. 75 (Bkrtcy. 9th App. Panel 2000), holding *not* constrained, with *In re Mercado*, 124 B.R. 799, 801-802 (Bkrtcy. C.D. Cal. 1991) (*criticizing Howell*), and *Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177 (9th Cir. Bank. Panel 2003) (taking issue with *Bartleson*–though from the *same court*), holding some constraints *are* permitted.

Following Mercado, and also in a "published opinion," the case most closely on point factually, as well as legally, to this case is *Martin v. United States (In re Martin)*, 150 B.R. 43, 45-47 (Bkrtcy. S.D. Cal. 1993). *Martin* holds curtailments *are* permitted. Quoting from *Mercado*, *Martin* holds: "Stated another way, § 1141(d)(2) [of the Bankruptcy Code] preserves the right of a creditor holding a nondischargeable debt to full payment. It does not provide that the provisions of a confirmed plan cannot affect the rights of such a creditor . . .." *Martin* at 46 (emphasis added). Delp solicits this position.

There is no question that *Martin* is cogent to this case. There, the IRS filed a proof of claim on overdue taxes. The IRS was a nondischargeable creditor. It reached an agreement with the debtor, incorporated into the plan. The plan contained strictures on how the IRS could collect the deficiency. Nevertheless, the IRS issued Notices of Intent to Levy. The debtors filed a "motion to enjoin the IRS from using collection procedures that exceeded the scope of those approved in the confirmed plan . . .." *Martin*, *supra*, 150 B.R. at 45. In response, just as Nu-Way does here, "The IRS argues that because its claims are nondischargeable, the plan and order have no effect. . . . It cannot be constrained by any plan confirmation [and] it is free to collect the taxes outside the plan . . .." *Id.* at 46.

Nu-Way's actions mirror those of the IRS in *Martin*:

> Here, the *IRS chose to participate* in the plan, negotiating with debtors and reaching agreement on a filing schedule for missing returns. It withdrew its objection to plan confirmation, and *agreed to the form of the confirmation order* after hearing and *filed its proof of claim* according to the agreed procedures. *Now it wants to be free to pursue other determinations and collection techniques as though it had never submitted a claim* . . .. It argues that the confirmed plan specifically included the text of § 1141(d)(2), and

therefore excludes non-dischargeable taxes from its operation.

Id. (emphasis added). These are hardly distinct from Nu-Way's conduct.

In this instant case, Nu-Way (a) filed several proofs of claim; (b) participated in the consortium which drafted the winning plan; (c) obtained confirmation; (d) had not yet obtained a determination whether Nu-Way's claim would be discharged, or not, when the plan was drafted, proffered and confirmed; (e) explicitly listed itself as a creditor in *several* provisions in the Plan; and (f) included in the Plan provisions explicitly drafted in favor of Nu-Way, with rights it would not independently have had as a nondischargeable creditor. [n.2] This legal analysis invites application of the *Martin* holdings in our case even more compellingly than it did in *Martin* itself.

——footnote 2——

2 Whether those terms *reached fruition* is a "20/20 hindsight" evaluation irrelevant to determining the intent of the Plan as to Nu-Way when the Plan was drafted and confirmed. The purpose of contracts is determined when they are entered into, not by what may happen down the road. "The appellants' intent cannot be judged on the basis of hindsight." *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 881 (Tex. App.–Corpus Christi 1988, writ denied).

——end footnote——

The *Martin* Court also noted the IRS' disregard of the court's rulings. Congress never intended for a creditor to (a) represent plan satisfaction to the Court yet (b) continue as if no proceedings occurred, or judicial intervention invoked. Days, weeks, and months of time and effort, with corresponding expense, would become simply so much dissipation.

C. **CONSTRUCTION OF STATUTE AND PLAN SHOW DELP IRA IS EXEMPT.**

In response to II.C. of the ARB, Delp submits the *actual* "common sense" issue is rather whether Nu-Way is bound by its own hand-crafted contract. The answer is *yes*. A corollary is whether Bankruptcy Code § 1141(d)(2) overrides the universal rule that persons may modify contractual rights voluntarily between themselves. The answer is *no*.

A number of courts have adopted the position that plan involvement equals plan submission. [n.3] Regardless of the authorities, however, this instance is straightforward construction of a straightforward statute. Under that circumstance, statutes cannot be construed to effect an illogical consequence. "[W]here an application of a statute's plain language leads to absurd results, courts do not enforce the statute under a literal interpretation." *Olivares, supra*, 126 S.W.3d at 248 (cites omitted). Here, *both* the "plain language" *and* the logical consequence *harmonize*. Instead, the "absurd result" would be if a creditor could (a) write its own ticket in a bankruptcy plan, but (b) still not be bound by it. Thus, *were* this statute *vague* (and it is not), this would be a perfect example where the "absurd result ... should not be enforced under a literal interpretation." *Id.*

——footnote 3——

3 Nu-Way charges that some Delp cases are "unpublished." No case Delp has cited had any legend that they are not intended to be precedent, or "for electronic use only," or the like. Also, Texas has reversed itself on use of "unpublished" cases. While not "precedent[ ]," they "may be cited," which means a court *may*, but is not *required* to, follow it. TRAP 47.7. Further, all "foreign" cases are "informative only" in all events, regardless of publication. Therefore, any "unpublished" status is irrelevant. Moreover, In response to Point II.B., all Delp cites *do* support Delp's position.

——end footnote——

Next, Nu-Way intimates that even were the Plan capable of being a settlement, [n.4] it still could not bind *Nu-Way,* because Nu-Way received no consideration. The sole support for this claim is a single, short sentence in the parties' stipulations: "No *payments* have been made on the Nu-Way Judgment." Stip 5, ¶ 25 (emphasis added). But "payment" is not co-terminus with "consideration," or "value," or "benefit." If Nu-Way did not receive overt payments, this does not undermine settlement, breach of contract, or quasi-estoppel defenses against Nu-Way's claim based on "no consideration." *See*:

> "[W]e concur with the view held by courts in other states that it is proper, when determining the adequacy of consideration for transfers of public property to private entities, to evaluate the entire transaction as a whole. ... The consideration may consist of benefits other than, or in addition to, money, such as the public benefit which flows from the transfer. ... *See, e.g.*, ... (... *economic by-products of expected development were adequate consideration*)."

Bishop v. City of Burlington, 2001 WI App. 154; 246 Wis. 2d 879; 631 N.W.2d 656 (2001) (emphasis added; citations omitted). [n.5] Moreover, Harvison is Nu-Way, so consideration to Harvison binds Nu-Way as well.

——footnotes 4 & 5——

4 Which it *is*, as a matter of *law–First Union Commercial Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996) ("*Varat*")– regardless how Nu-Way chooses to look at it.

5 "Paid" is not a linguistic equivalent of "benefitted." Benefit means "to be useful or profitable to." *Webster's Ninth New*

Collegiate Dictionary at 144 (Merriam-Webster: Springfield, Mass.1987). It was *beneficial* for Nu-Way to escape litigation, regardless any actual *money* being placed in Nu-Way's pocket. *Potential* recovery can sustain settlement. Further, consideration may exist by virtue of the mutual promises exchanged, "the promise of one party to the contract being a valid consideration for the promise of the other party." *Langley v. Norris*, 141 Tex. 405, 412; 173 S.W.2d 454, 458; 1458 A.L.R. 555 (1943).

----end footnotes----

Nu-Way negated through "fire-sale" all claims Delp had against it. DX 17 ("Plan") ¶ 5.03. Nu-Way intimates Delp's claims were unfounded, so no "consideration" passed hands to support Delp's contractual or estoppel defenses. However, long-established law is to the contrary:

> Without padding this opinion with more specific references to the cases, it appears ... [i]n the case of Callisher v. Bischoffsheim, L.R. 5. Q.B. Cas. 449, text 452, . . . that the plaintiff in good faith believing he had a valid claim against the Government of Honduras, was about to institute proceedings to enforce its payment. Thereupon in consideration that the plaintiff would forbear for a specified time to institute proceedings upon the claim, the defendant promised to deliver to the plaintiff certain debentures of the Honduras Railway. In a suit for the breach of this promise by refusing to deliver the debentures, it was held that the plaintiff's forbearance to institute suit for the period agreed upon was a good consideration, *although the claim upon which he was about to sue was wholly unfounded.*
>
> In that case Lord Chief Justice Cockburn said: "No doubt it must be taken that there was, in

> fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it." * *
>
> * This rule generally prevails in the courts of this country.

Henderson v. Kendrick, 82 Fla. 110, 114-15; 89 So. 635, 637 (1921).

Virtually *any* right can be waived, even *constitutional* ones. *In re Prudential Insurance Co.*, 148 S.W.3d 124, 133 n.32 (Tex. 2004). Therefore, a right of merely *statutory* magnitude must be subject to being waived. "Prepetition creditors" do not fall within some special "protected class" whereby they are not bound by their own contracts and agreements. [n.6] Nu-Way must be held to its own bargain. Nu-Way cannot draft and enter a contract and then claim inefficacy of the terms as against it. *In re*

Weekley Homes, L.P., supra, 2005 Tex. LEXIS 817 at *21.

——footnote 6——

6 "[I]t simply cannot be overlooked that [Nu-Way] is a sophisticated creditor." *In re Bivens*, 324 B.R. 39, 44 (Bkrtcy. N.D. Ohio 2004).

——end footnote——

Nu-Way further argues there is nothing inconsistent between its rights *under* the Plan and those *outside* the Plan. To reach this unlikely result, Nu-Way relies on *half a sentence* in the Plan: "provided however, the discharge shall not **discharge** the Debtor from any *claims* which are ultimately determined by the Court to be nondischargeable pursuant to the allegations of any pending adversary proceedings which are currently pending before the Court." Plan at 21-22, ¶ 9.01 (emphasis added). *But see Mercado, supra* (rejects IRS argument of exception) [*sic*] based on a similar clause). 150 B.R. at 46.

Focusing on "claim" is dispositive. The word's meaning can only be unambiguous, *i.e.*, perfectly clear to anyone what it means–the *right* to collect [n.7]; or (b) ambiguous, in which event it must be construed against the drafter, producing the same result. Either way, Nu-Way did not "disengage" from the Plan once Nu-Way's claims were declared nondischargeable. Nu-Way was a "*creditor*" when the Plan took effect. "Upon the date of the entry of the Order Confirming Harvison's Plan, the provisions of Harvison's Plan shall bind the Debtor and *any* Creditor ...." Plan ¶ 9.03 (emphasis added). Harvison's word "*any*" does not except "nondischargeables."

——footnote 7——

7 "To ask for esp. as a right ‹~*ed* the inheritance." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster: Springfield, Mass. 1987) at 244 (def. a) (emphasis added). The construction is

illuminated by the illustration, *i.e.*, "the inheritance." That *right* is not free from restrictions. On the contrary, *many* obstacles may need to be overcome before possession of an inheritance may be had. Under the Plan, Nu-Way was subject to conditions. There is no *carte blanch* [*sic*] for Nu-Way to take any and every property of Delp however Nu-Way might elect. Nu-Way consented to *leave Delp IRA to Delp*, and *collect against <u>everything else</u>*.

——end footnote——

The Harvison Plan *explicitly acknowledges* there would be nondischarageable creditors. Plan ¶ 9.0. Their absence as a listed exception from "any" could not have been due to an oversight. Plan ¶ 9.03 is all-encompassing. Plan ¶ 9.03 uses the very most expansive term available–"*any*." Harvison *knew* his company, Nu-Way, was at that precise moment "waiting in the wings" with its nondischargeability litigation. In fact, *it was already underway*. But, in the *next section*, when he says who will be bound by the Plan, he simply does not except out those just-identified nondischargeables. *Cf. Baty v. Protech Insurance Agency*, 63 WS.W.3d [*sic*] 841, 855 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) ("when specific claims have been filed and are the subject of pending litigation, a failure to identify them by name strongly suggests that the parties did not intend to include them in the release."). Therefore, Plan ¶ 9.03 applies to Nu-Way.

The statutory language is precisely consistent with the modification of nondischargeability rights by consent accomplished in this Plan. "[C]onfirmation of a plan does not **discharge** any individual debtor from any debt excepted from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2). DAppx C 1. Nothing in the statute's language suggests Congress ever meant that "avoiding *discharge* of debt" was synonymous with "no restrictions on the methodology for collection of that debt." [n.8] Nu-Way may still seek to obtain complete satisfaction of all of Delp's debt–a right not afforded to *dischargeable* creditors. Delp's interpretation renders no term of the Statute or the Plan meaningless or of no effect. Delp merely

follows those ter[illegible]ommon construction.

——footnote 8——

8 In construing a legislative provision, "a statute's plain meaning should be conclusive ..." *In re Box*, 324 B.R. 290; 2005 Bankr. LEXIS 753 at *8 (Bkrtcy. S.D. Tex. May 4, 2005).

——end footnote——

What Section 1141(d)(2) implements is a "default." Nondischargeable creditors who do *not* participate under a plan nevertheless retain their *claims*. That is, such a creditor is not barred from collection against the debtor simply by not participating in and under the Plan. Whereas here, by *being involved*, and *including itself* in the bankruptcy Plan, Nu-Way *voluntarily abdicated* whatever rights it might otherwise have had if it chose not to participate in the Plan. Instead, it chose in favor of the Plan *it crafted*. [n.9] The motive and consideration for Nu-Way to do so were the benefits Nu-Way obtained under the Plan.

——footnote 9——

9 The Plan is signed off on by, *inter alia*, "John Harvison." The Trial Court found *total privity* between Harvison and Nu-Way. ApBrf at Tab 2, Findings ¶¶ 7, 8, 35, 36; Conclusions ¶¶ 26-35. Therefore, Harvison's signature *is* Nu-Way's signature.

——end footnote——

Alternatively phrased: No nondischargeable creditor is deprived of its rights as such by not being included in the plan. Whereas, a creditor who *voluntarily* undertakes to (a) *draft* the Plan, (b) *vote in its favor*, and (c) *obtain benefits thereunder*, some of which they could not have been eligible for merely based on their nondischargeable status are bound by the Plan (excepting the *amount* and *viability* of the claim).

Nu-Way entered a contract with Delp. It made that same contract with all the other creditors. The contract had some points favorable to Nu-Way. It had some others which were not. This is just like any other contract (and especially any *settlement* contract). Nu-Way did the calculus, weighed the pros and cons, and exercised its "right to vote." Having done so, Nu-Way cannot now abandon the contract–being its wordsmith.

"Courts apply the rules of contract interpretation to the interpretation of a reorganization plan." *Varat, supra*, 81 F.3d at 1317 (citation omitted). "Language used by parties in a contract should be accorded its plain, grammatical meaning...." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). "Contracts must be construed in a fashion giving effect to each term. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391 (Tex.1983) (citations omitted). Under these rules, the word "any" must be given full effect, *particularly as to the Plan drafter*, Nu-Way (through its privy, Harvison). "Any" includes Nu-Way. Nu-Way may continue to seek satisfaction from Delp *elsewhere*, and for as long as it may elect, but is *otherwise* subject to the confirmed Plan, as is any other prepetition creditor of Delp. The Plan says Delp may retain Delp IRA. He may keep it as to Nu-Way just as much as to anybody else. Nu-Way *agreed* to that condition. It must abide by it.

* * * [Omit Argument D regarding preclusion by the intervening State Court Judgment.]

E. PARTICULAR RESPONSES TO PARTICULAR POINTS OF NU-WAY.

Having been faulted by Nu-Way for not responding point-by-point to all of Nu-Way's assertions, Delp here replies to the most egregious propositions in Nu-Way's ARB.

1. *Nu-Way's Distinctions of Plans in Other Cases from Delp's Case's Plan Fail.*

At ARB 7, Nu-Way *correctly* states: "Nu-Way does not challenge the confirmed plan. Obviously the plan is res judicata as to the issues it addressed." However, it must be added, "or could have addressed." Regardless, Nu-Way ineptly tries to distinguish Delp's cited cases; *e.g.*: "The IRS in *Black* was pursuing an untimely challenge to a confirmed plan which expressly discharged a portion of the IRS' claim." This is a distinction without any difference. The point of *Black* was that a nondischargeable creditor *could have its rights affected by the Plan*. The *Black* case was *correct*. Nu-Way's rights were likewise so affected. The claim was not *discharged*, but the Plan *limited* how it could be *collected*.

2. *The Debtor's Good or Bad Faith <u>is</u> Irrelevant.*

"Obviously the debtor's good faith, or lack thereof, will be relevant to the court's interpretation of whether assets will remain forever exempt." ARB 10 (footnote omitted). This is not correct. Whatever Delp's motive might have been at the time, or at this time, has nothing to do with whether Delp IRA is exempt. If Nu-Way is suggesting fraud or misconduct by Delp, the bankruptcy forum would be the proper forum, not this Court. Of course, it is long since past any and all deadlines for Nu-Way to make such assertions there. Nu-Way states this here nonetheless solely to tarnish Delp before this Court. In response to Nu-Way's specific statements: (a) "[The] court would therefore deny debtor's request to amend its claimed exemption." Delp is not requesting an *amendment* of anything. (b) Quoting another case, Nu-Way says: "[D]ebtor's failure to disclose tax refund warranted denial of discharge even if refund would have been exempt." But *dischargeability* is not the issue, only whether collection of that nondischargeable debt may be modified by the plan. (c) "[E]ven where no one timely objects to a debtor's scheduled exemption, the exemption is not effective in every instance." Nu-Way cites a 1990 case for that point. However, in 1992, the United States

Supreme Court decided *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), holding that failure to timely challenge a debtor's list of exemptions *does* waive any objection. In any event, there has been no showing that any act of Delp would come under such an "instance."

3. *Nu-Way Gained Added Rights Under the Plan.*

On page 13 and in n.8 of the Reply, Nu-Way confuses the issue. Delp has not been arguing that any "extra rights" were gained by himself or Mrs. Delp. Instead, Delp says *Nu-Way* gained extra rights over what it would have had absent the Plan. Plan ¶ 4.10 says that "the Debtor's *spouse* shall retain no non-exempt assets." This does *not* say Mrs. Delp retains her *separate property*. By standard rules of contract construction, this would mean Mrs. Delp did *not* retain any of her separate property free from the claims of Delp's creditors. Therefore, it is just beyond any argument that Nu-Way did obtain rights under the Plan that it otherwise would not have had, whether they would ultimately amount to anything or not.

Taking separate property of one spouse to pay the debts of the other spouse is prohibited. *In re Nahat*, 278 B.R. 108 ((Bkrtcy. N.D. Tex. 2002). Nu-Way had no rights against Mrs. Delp's separate property until the Plan (including ¶ 4.10) was confirmed. Yet, the Plan is yet [*sic*] still enforceable. *See, e.g., In re McAfee*, 120 B.R. 76 (Bkrtcy. N.D. Tex. 1990) (cannot release a guaranty, but the plan did, and the plan prevailed over Code); *Great Lakes Higher Education Corp. v. Pardee (In re Pardee)*, 218 B.R. BR. 916 (Bkrtcy. 9th Cir. App. Panel 1998), *aff'd*, 193 F.3d 1083, 1086 (9th Cir. 1999) ("This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions") (cite omitted). ¶ 4.10 was a *quid pro quo* provided Nu-Way to participate in the Plan. Thus, Nu-Way is *not* in the category with nondischargeable creditors never involved in their debtors' cases. It is appropriate to hold Nu-Way to a bargain it made, while not binding other nondischargeable creditors to bargains they did *not* make.

4. *Delp Had No Obligation to Advise Nu-Way About the FFRE Transaction.*

Delp did not "mislead" anybody about anything in the bankruptcy. He correctly and properly listed his exempt properties when he filed his case. Upon there being no objections, he *owned* the properties and could do with them as he liked. *Cf. Lowe v. Yochem (In re Reed)*, 184 B.R. 733, 738 (Bkrtcy. W.D. Tex. 1995) (debtor may "sell the house, buy a Winnebago, and travel around the country from campground to campground with his wife and his dog"). [n. 16] At the time the FFRE Transaction occurred, there had been no adjudication of any nondischargeable status of Nu-Way. It can hardly be argued that Delp was obliged to be prescient that he would lose that *Nu-Way* dischargeability case. Not knowing the future, and not being obliged to, Delp IRA could enter the FFRE Transaction as he pleased, without obtaining permission from Nu-Way, or making any disclosures to anyone. Nu-Way inappropriately attempts to paint Delp in a bad light in this insinuation. Moreover, it is difficult to tell what Nu-Way attempts to prove in this regard in the testimony it quotes. It cannot prove that Delp was required to tell Nu-Way anything about FFRE.

——footnote 16——

16 Nu-Way objects to Delp citing the *Reed* case because *Reed* allows that subsequent conduct can result in loss of the exempt status. This is completely misleading. What *Reed* holds, and Delp does not contest, is the unremarkable notation that the exemption may be lost by such use as to *post-petition* creditors. It may *not* be lost to *prepetition* creditors. The distinction is that as to creditors who ultimately become nondischargeable, the debtor does not retain exempt status, *if lost post-petition*. Delp is not contending anything to the contrary. Delp says: (a) Delp IRA was originally listed as exempt in Delp's bankruptcy Schedule C, and (b) the Plan says Delp could retain what was listed as exempt in his Schedule C. It is the *plan* that is dispositive under these facts, but the initial exemption plays a roll in that because of its adoption into the Plan.

In addition, however, Delp also maintains (a) the Delp IRA *did not lose its exemption in actual fact*, and/or (b) Nu-Way can no longer contend that Delp IRA lost its exemption in the FFRE Transaction, because Economy, its privy, forfeited that right by not addressing it in the *Economy* litigation, under Texas' and federal bankruptcy's transactional approach to *res judicata*.

——end footnote——

5. *The Permissible Inferences Favor Delp, Not Nu-Way.*

On page 16, Nu-Way takes note of the fact that Delp advanced a proposition "utterly without citation. . . . There is no record reference to support this incredible assertion." However, Delp merely *drew an inference* from undisputed facts. Delp cited *six pages* of authorities in his Brief in Chief (and Nu-Way, inconsistently, complained about *that* as well). The briefing obligations are not quite so stringent as to require recitation of the law and Record for every single obvious proposition. Regardless, Delp showed at length that Nu-Way lost some nondischargeable rights when it proffered, supported, and voted in favor of a Plan that gave Nu-Way advantages it would not have had absent the Plan. That is the essence of the defenses of (a) forfeiting, (b) waiving, and (c) making an election. This *is* the heart of the settlement. Each side had rights coming in, and each had a different set going out. Therefore, no citation was necessary to support these fundamental, and obvious, legal characterizations from undisputed facts.

* * * [Omits argument 6 regarding *characterization* by accountant of what the IRA owned while property was in registry of another State Court, not passed on by Waco court and not relevant to or dispositive of any issue before this Court.]

F. **NO OFFSET FOR ATTORNEYS' FEES.**

It is obvious Delp is entitled to his fee award if he prevails

on the other issues, whether under (a) contract, (b) declaratory judgment, or (c) bankruptcy law. The only question is one of setoff. The principle of setoff is that if two creditors, *in the same capacity*, have claims or judgments between them, they should be "balanced out." However, this is subject to caveats: (1) Delp was awarded fees *as a conduit* to Delp IRA or counsel, not on his own behalf; and (2) a party cannot be permitted to profit or benefit from his own wrong. *Kothman v. Boley*, 158 Tex. 56, 60; 308 S.W.2d 1, 4 (1957); *followed, Muller v. Leyendecker*, 697 S.W.2d 668, 673 (Tex. App.–San Antonio 1985, no writ); *accord, Ragland v. Ragland*, 43 S.W.2d 758, 759 (Tex. App.–Waco 1987, no writ).

Nu-Way's Plan provided Delp could *keep* Delp IRA. "Keep" means free from being taken. Yet Nu-Way filed *two suits* to capture Delp IRA. The result–Delp IRA is *depleted of the asset Delp was supposed to retain*, spent on attorneys' fees incurred so Delp could retain them. The harder Delp has had to fight to retain the Delp IRA asset, the more he was depleted of it, satisfying the not-being-allowed-to-profit-from-its-own-wrong ground. Conclusions of Law ¶¶ 28-35. PAppx 2 12-13.

Delp did not institute a suit *to recover on a claim of his own* against Nu-Way. *Nu-Way* instituted this suit to deprive Delp of what Nu-Way had already consented Delp could retain. Delp had no option but to incur fees (short of total capitulation). Nu-Way agreed in the Plan not to deplete the reservoirs of Delp IRA in attempting to collect against Delp. Nonetheless it has done so. It must now be required to refund what it depleted, without offset.

CONCLUSION & PRAYER FOR RELIEF.

Delp IRA cannot be divested of the proceeds of the FFRE Transaction, due to res judicata. Also, no prohibited transaction occurred. The Judgment should be **AFFIRMED**, including attorneys' fees awarded to Delp earmarked for Delp IRA or counsel, with no setoff.

Respectfully submitted,

/s/Thomas F. Harkins, Jr.
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* * * [Omit Firm Identification]

ATTORNEYS FOR DEFENDANT/ APPELLEE DELP

* * * [Omit Certificate of Service, December 14, 2005, signed by Thomas F. Harkins, Jr.]

10 Extracts from Appellee's [Petitioner Delp's] Second Supplemental Sur-Reply Brief to Waco Court of Appeals:

NO. 10-05-00065-CV

IN THE COURT OF APPEALS
FOR THE TENTH JUDICIAL DISTRICT OF TEXAS
AT WACO

NU-WAY ENERGY CORPORATION,

Plaintiff/Appellant.

v.

BILLY R. DELP, JR.

Defendant/Appellee.

ON APPEAL FROM THE 96TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS
CAUSE NO. 96-183839-00

APPELLEE'S SECOND SUPPLEMENTAL SUR-REPLY BRIEF
[Local Rule 13(e)]

* * * [Omits other formal portions and Tables.]

ISSUES PRESENTED

1. Is a nondischargeable creditor bound by the terms of a Chapter 11 Plan when it wrote that Plan itself?

2. May a party, including a nondischargeable creditor, agree to waive certain rights they may otherwise have had by a contract, and particularly by a Chapter 11 Plan contract?

3. Does a Plan limitation of specified property which cannot be collected against require an injunction term to be effective against creditors seeking that property?

4. Should a penal statute be strictly construed and not extended beyond the clear meaning of its language?

5. Can property rendered exempt from creditors–by being listed as exempt, and never challenged thereafter–be rendered nonexempt as to prepetition creditors by post-exemption acts of the debtor?

6. Did Nu-Way elect its remedies by benefitting from the Plan?

7. Who may receive the attorneys' fee award, and must it be offset?

8. May a mere bookkeeping error result in loss of exemption?

ARGUMENT

A. INTRODUCTION.

1. Privies JOHN HARVISON ("Harvison"), ECONOMY OIL COMPANY (Economy), and NU-WAY ENERGY CORPORATION ("Nu-Way") (Appellant) have been in litigation with BILLY R. DELP, JR. ("Delp") (Appellee) and Billy R. Delp, Jr., IRA ("Delp IRA") for at least fifteen years. Included in that was Delp's Chapter 11 case. Among the issues in this case is the import of the Chapter 11 proceedings. This issue is further developed and supplemental authorities discussed in this brief.

B. EFFECT OF DELP IRA EXEMPTION & CONFIRMED PLAN ON NU-WAY

2. Nu-Way claims: it did not benefit under the Chapter 11 Plan so it cannot be bound by it. This is false. *See, e.g.*: " When the releasor acquires a legal right to which he would not otherwise be entitled in exchange for signing the release, the releasor receives a benefit." *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d at 570-71 (emphasis added; citation omitted).

3. Nu-Way says: misconduct by Delp *following* Delp IRA becoming exempt forfeited that exemption. This is not so. *See, e.g., Cisneros v. Kim (In re Kim)*, 257 B.R. 680 (Bkrtcy. 9th Cir. App. Panel 2000), *aff'd w/o opinion*, 35 Fed. Appx. 592 (9th Cir. 2002): "In this case, the panel must reject the Trustee's position that Debtor's post-petition conduct determines the nature of the exemption." *Id.* at 685.[*sic*] (emphasis added). Nu-Way incorrectly relies on *Lowe v. Yochem (In re Reed)*, 184 B.R. 733

(Bkrtcy. W.D. Tex. 1995) to defend this point, claiming *Lowe* allows for post-exemption transformation of property to defeat its exemption, *citing id.* at 738 n.7. However, the extended discussion in the *Reed* case shows Nu-Way's interpretation *cannot be correct.* "Nothing in section 522(c) even vaguely suggests that, as a precondition to enjoying the protections of the provision, the debtor must maintain the exempt character of the property." *Id.*

4. Nu-Way suggests the issue of bankruptcy exemption can be determined by post-petition events. To the contrary, however, as *Zibman v. Tow (In re Zibman)*, 268 F.3d 298 (5th Cir. 2001) holds: "Any exemptions claimed...are determined by the facts and the law as they exist on the date of filing the bankruptcy petition. This focus on the status as of the date of filing is commonly referred to as the 'snapshot' approach ...." *Id.* at 302 (note omitted). *Accord, In re Bartholomew*, 214 B.R. 322, 328 (Bkrtcy. S.D. Ohio 1997) ("If the property is excluded from the bankruptcy estate at the time of the bankruptcy filing, a subsequent change in its form does not bring it into the estate."). Nu-Way's reliance on *In re Zenone*, 278 B.R. 792 (Bkrtcy. E.D. Ark. 2002) is misplaced. It states: "Many Courts have concluded that if the debtor has acted in bad faith in connection with the case... the debtor's request to amend the claim of exemptions should be denied." *Id.* at 795. But this is the right to *amend*, not to *retain* the original exemption: Thus, *Zenone* goes on to say: "The Trustee will amend his final account to *permit the Debtors' original claim of exemption*" (emphasis added).

5. Nu-Way also cites *Mertz v. Rott*, 955 F.2d 596, 597 (8th Cir. 1992) ("I do not regard any omission from statements of financial affairs or schedules to be trivial where it has any bearing on the existence or disposition of potential estate assets."). The key is: "where it has any bearing." Here it did not. Regardless whether *Mertz* is right, it did not involve a debtor's use of property which was already *exempt* when the case began.

C. **AUTHORITIES REGARDING ATTORNEYS' FEES TO COUNSEL.**

6. Nu-Way says there is no federal "common law" supporting fees to counsel under bankruptcy law. Nomenclature aside, federal case law sustains Delp's position. [n.1]

——footnote 1——

1 This is in addition to the District Court's right to allocate the fees in its discretion as it saw fit under *declaratory judgment* law. Fees under the Declaratory Judgment Act are discretionary in all events, i.e., whether to award *any*, and *to whom*. "Directly to counsel" fits in that discretion.

——end footnote——

7. In *CIR v. Banks*, 543 U.S. 426 (2005), the Court discusses at length whether fees go to the client or counsel *for tax purposes*. At the same time, however, the Court intentionally *sidestepped* the issue of a fee claim when "federal statutes that authorize fee awards to prevailing plaintiff's attorneys... [because] statutory fees enable 'plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail.'" -U.S.-; 125 S.Ct. 826, 834. If it were true that "ownership" of fees could never vest in counsel, this caveat would have been unwarranted; indeed, it would be *misleading*.

8. In the decision of *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990), the Court held that "[i]f § 1983 plaintiffs may waive their causes of action entirely, there is little reason to believe that they may not assign part of their recovery to an attorney if they believe that the contingency arrangement will increase the likelihood of recovery." *Id.* Ownership of a right of recovery *can be transferred to an attorney*. This includes attorneys' fees. Counsel and client in this case are unanimous that the fee award in this case is to go to counsel for the extended representation in this complex and lengthy case.

9. *Lowrance v. Hacker*, 966 F.2d 1163 (7th Cir. 1992) (following discussion, holds the attorney "has standing to petition

for his reasonable fees for those services").

10. A major case on fees to counsel is *Samuels v. American Motors Sales Corp.*, 969 F.2d 573 (7th Cir. 1992), holding, in part, on this issue, as follows:

> The statute under which Mr. Parramore claims a right to attorney's fees, like section 1988, confers the entitlement to fees on the prevailing plaintiff and not his attorney. *However*, this court pointed out in *Lowrance* that "'technically, the award of attorney's fees under section 1988 is to the party, not to his lawyer, but it is common to make the award directly to the lawyer where . . . the lawyer's contractual entitlement is uncontested.'" *Lowrance*, No. 91-1121 slip op. at 6 (quoting *Richardson v. Penfold*, 900 F.2d 116, 117 (7th Cir. 1990). In *Lowrance* we said, "this exception makes sense; where the lawyer is acting in his capacity as the client's representative, the question whether the motion for fees is in the name of the party or his attorney is truly a 'technicality.'" *Id.* But, this case is different because Mr. Parramore is no longer Mr. Samuels's representative, having been discharged by him before this appeal.
>
> We think, despite the fact that Mr. Parramore is no longer Mr. Samuels's [*sic*] attorney, that he may pursue his appeal on the issue of attorney's fees against American Motors without Mr. Samuels. First, Mr. Parramore was clearly acting on Mr. Samuels's [*sic*] behalf in procuring a jury verdict in Mr. Samuels's [*sic*] favor under the Magnuson-Moss Act. The jury awarded Samuels $ 14,086.95. And, when Mr. Parramore initially filed a motion for attorney's fees subsequent to the court's entry of judgment

against American Motors, he was still acting on Samuels's [*sic*] behalf. Thus, the petition was brought in Samuels's [*sic*] name. It was not until after the trial court ruled on Mr. Parramore's motion to reconsider the trial court's March 29, 1991, ruling, the ruling in which the court decided Mr. Parramore was entitled to only $ 11,137.00 in fees, did Mr. Parramore request permission from the court to proceed in his own behalf. This appeal concerns fees for work Mr. Parramore did in procuring a jury verdict for his former client, nothing else.

Second, **there is no evidence in the record suggesting that Mr. Parramore's fee is contested by Mr. Samuels**. In fact, the trial court stated that the fee contract between Mr. Parramore and his former client can be reasonably interpreted to say that Samuels agreed to pay his attorney whatever amount might be awarded by the court for attorney's fees under the statute. Given that enforcement of this interpretation of the fee contract between Mr. Parramore and his former client would not interfere with Mr. Samuels's control over his case–Samuels has already received a judgment in his favor–we think Mr. Parramore should be allowed to pursue his claim to an attorney's fee awarded by the trial court under the Magnuson-Moss Act.

Samuels, *supra*, 969 F.2d at 576-77 (emphasis added). That case is this case.

11. Further, *In re Harrington*, 306 B.R. 172, 185 (Bkrtcy. E.D. Tex. 2003) holds: "it becomes evident that Congress did not intend for debtors to pay a portion of the attorney's fees out of their exempt property") (emphasis added; citations omitted). Nu-Way is seeking to have Delp pay from his IRA the attorneys

fees incurred to defend the IRA's exemption. Unless the fees instead go to counsel (instead of merely an offset to Nu-Way), the properties of the IRA will be decimated. Clearly the bankruptcy law's intent was to avoid precisely the scenario Nu-Way advances before this Court.

12. Also dispositive is *Myers v. America's Servicing Co.*, 227 F.R.D. 268, 271 (E.D. Va. 2005) ("In considering the maximum amount necessary to deter future litigation abuse, ...the court levies sanctions as follows: attorney's fees...to be paid directly to counsel for defendant.") (emphasis added). This is the case here. Nu-Way's wrongful efforts to invade exempt IRA property have depleted that property. Since Nu-Way's actions *were* wrongful, and they required invasion of Delp IRA's property through some $400,000 in fees, payment for those fees should go "directly to counsel," with no offset.

13. Nu-Way's case *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999) embraces the rule of fees to the party, not the attorney. However, it is not all encompassing as to all causes of action, and in all events is not binding on this Court. The *actual* question is one of (a) jurisdiction and (b) public policy. The Bankruptcy Code and the cases decided under its aegis provide for both. First, federal courts have the authority to require sanctions fees to be paid directly to counsel for the prevailing party. *Myers*, *supra*, 227 F.R.D. at 271. Second, when the purpose for which fees are intended would be defeated by payment to the party, fees to counsel are sometimes appropriate.

14. Also, here, just as in *Samuels*, *supra*, 969 F.2d at 577, "there is no evidence in the record suggesting that [Delp's Counsel's] fee is contested by [Mr. Delp]." Nu-Way, the *opposing party*, is trying to step in and determine who gets the fee as between *Delp and his counsel*. Nu-Way does not have that prerogative. As between Delp and his counsel, there is no argument who gets what once this appeal is concluded. Nu-Way does not have standing to interfere with that.

15. In short, (a) public policy does not encourage bankrupt debtors having to pay their fees out of their exempt property. *In re Harrington, supra*, 306 B.R. at 185. Also, in at least *some* federal instances, (b) attorneys' fees may be awarded directly to counsel. *Myers, supra*, 227 F.R.D. at 271. (c) The public policy which is implicated in fee transfer cases, protection of the client from becoming adverse with his counsel, has no application. Therefore, (d) federal "common law" *does* support the fee directly to counsel here.

D. A PENAL STATUTE (LIKE FORFEITURE OF EXEMPT STATUS) MUST BE READ STRICTLY AND NOT BE EXTENDED BEYOND THE CLEAR MEANING OF ITS LANGUAGE.

16. The primary bankruptcy statutes involved are 11 USC §§ 523(a)(2)(A) (DAppx TAB B at 1) & 1141(d)(2) (DAppx TAB C at 1). All they say is that a debt of the nature involved here is *not discharged* upon the confirmation of the Chapter 11 Plan. They do *not* say the debt (a) cannot be *modified* in any respect, or (b) may not be subjected to certain strictures, or (c) may not be affected in any way. Absent clear and specific language to that effect, such caveats should not be read in. Statutory construction follows the rule that "Courts may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning." *Cortez v. Progressive County Mutual Insurance Co.*, 61 S.W.3d 68, 72 (Tex. App.–Austin 2001, pet. dism'd by agreem.).

17. If a statute is penal in nature or effect, as these clearly are (*i.e.*, 11 U.S.C. § 523(a)(2)(A); 11 U.S.C. § 522(c), 11 U.S.C. § 1123(b)(1), and 11 U.S.C. § 1141(d)(2)) (in that they leave a debtor saddled with an obligation which will hound him the rest of his life), then "it should be strictly construed and must not be extended beyond the clear meaning of its language." *Williams v. Adams*, 74 S.W.3d 437, 440 (Tex. App.–Corpus Christi 2002, pet. denied). Nu-Way attempts to obviate this rule by claiming that federal *tax code*/ERISA provisions are *not* strictly

construed. However, it is not entirely clear whether some component even thereof might not be read generously in favor of those for whom such provisions were designed to benefit. Be that as it may, the statutes now addressed are *bankruptcy* provisions dictating the effect of *claims* and Chapter *plans*.

18. The key issues are (a) whether the Delp IRA was exempt when Delp's petition was filed, and (b) whether the Plan allowed Delp to keep Delp IRA free from bankruptcy creditors because it was then exempt. The facts are not contested. *See* Amended Joint Stipulations of Facts by the Parties (Ex. H to Optional Appx, ¶ 1 [Delp IRA "began as a rollover account from a qualified ERISA plan"]); and *id.* at ¶ 6 (["Delp filed his required Schedule "C" in his Chapter 11 Bankruptcy. No one objected to Schedule "C."]). The answers to these two questions are "yes," based on the conceded facts.

19. Applying strict construction to these bankruptcy statutes requires:

> refus[ing] to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute as well as within its spirit or reason, resolving all reasonable doubts against applicability of the statute to the particular case.

Williams v. Adams, *supra*, 74 S.W.3d at 440. As applied, these statutes do not address *exemptions*, only *nondischargeability*. The latter cannot be *expanded* to reach the former. The statutes only extend to allow nondischargeable creditors to collect their *debt*. They do not annihilate all *exemptions* of the debtor. Further, there is nothing in these statutes contrary to ascertainment of the exemption status when the bankruptcy is *filed*. Since the narrower reading is available, it should be adopted under strict construction principles.

20. Regardless the statutes' direct application, at the

least they do not *forbid* the parties (creditor and debtor), from reaching an agreement on exemption from collection *on their own*. They could even *forego* the debt *entirely*. And, in fact, the parties here *did* reach such a settlement in the *Plan*; *i.e.*, (a) Nu-Way *could* potentially pursue Delp, *though no other creditors could*. In return, (b) Delp could retain Delp IRA free from all collection efforts. Whether Delp IRA remained "in the estate" or not, it was property which was dealt with in the Plan, and Nu-Way signed off on that disposition as a matter of *contract*.

E. **THE *BARTLESON* CASE**.

21. Nu-Way's principal case on these issues is *In re Bartleson*, 253 B.R. 75 (9th Cir. B.A.P. 2000). Properly construed, *Bartleson* does not support Nu-Way's position. First, *Bartleson* agrees that a plan should be treated as a *contract*, not simply an *order*. *Id.* at 84. "A chapter 11 plan is a contract between the debtor and its creditors in which general rules of contract interpretation apply." *Id.* A court reviewing a plan must look to "the mutual intention of the parties, which is to be ascertained from the language of the Plan." *Id.* Therefore, the parties *may* change legal consequences from those that might otherwise obtain under bankruptcy law by *contract*–i.e., by *the Plan*. [n.2]

——footnote 2——

2 The correct understanding of the Plan contract has been shown in prior briefs.

——end footnote——

22. Second, it is apparent that the types of creditor-restrictions precluded by the Code, per *Bartleson*, are limits on *time* and *method* of collection efforts. Nothing says nondischargeable creditors have a right to collect *exempt properties*. When the Petition was filed, Nu-Way could not collect against Delp IRA *regardless* nondischargeability. Delp had the right to retain Delp IRA. The only question is, did Delp *lose* that

exemption, vis-a-vis Nu-Way, subsequently, because he substituted cash from Delp IRA for the FFRE assets. The answer is that, regardless whether he thereby lost exemption under *tax* or *state* provisions vis-a-vis *post*-petition creditors, he did *not* lose his exemption as to *pre-petition* creditors who *signed off* on his retention thereof in the Plan/contract.

23. In reality, the *only* question is: Was Nu-Way among those who "signed off" on the Plan's retention of Delp IRA for Delp? It certainly was. It was listed as a creditor in two different fashions. It was in privy with the drafter. It received benefits under the Plan (or, at least, *potential* benefits, which is all that is needed). Some of the benefits under the Plan would not have appertained under ordinary collection activities. In essence, *its name was on the signature line*. Therefore, Nu-Way is *contractually* bound to allow Delp to retain Delp IRA (and, of course, its contents, and proceeds).

24. To avoid this result, Nu-Way says (a) the Plan left it with an "out" and (b) it took advantage of that "out." Specifically, Nu-Way postulates that the "nondischargeable" provision of the Plan enables it to escape the "Delp IRA stays with Delp" paragraph. Thus, even though it *was* a party to the Plan, it says, it was not restrained by ¶ 4.10.

25. Whereas, saying a party may *continue to pursue a debt* is simply and clearly *not* an authorization to pursue a debtor *by every means*. Even as of *today*, there are properties against which Nu-Way cannot collect on its nondischargeable judgment against Delp. Numerous exemptions for collection, aside from Delp IRA, are still implicated.

26. Therefore, the insertion of Nu-Way into the group of those who could still continue collecting "outside the Plan" said nothing at all about against which properties it could proceed. In fact, *specifically addressing* the nondischargeability of Nu-Way's debt *without mentioning* any question of *exemptions* shows that the previously determined exemptions were not being overridden.

See, e.g., CKB & Associates, Inc. v. Moore McCormack Petroleum, Inc., 734 S.W.2d 653 (Tex. 1987):

> "Utilization of a rule of contract construction also prevents the conclusion that the settlement agreement precludes these causes of action as a matter of law. The maxim *expressio unius est exclusio alterius*, meaning that the naming of one thing excludes another, though not conclusive, is applicable to these facts. The settlement agreement released MMP from any claims and causes of action arising out of the presentation of the two quality drafts while claims arising out of the presentment of the volume draft were not mentioned. This silence raises an inference that the parties did not intend to preclude the volume draft presentment causes of action by the settlement agreement. Consequently, CKB's causes of action are not inconsistent as a matter of law with the settlement agreement."

Id. at 655-56 (citations omitted).

27. The only provision in the Plan which touches on Delp's exempt properties, ¶ 4.10, says Delp could *keep* them. No exceptions. Conversely, Nu-Way relies on ¶ 9.01:

> [P]rovided however, the discharge shall not *discharge* the Debtor from any *claims* which are ultimately determined by the Court to be nondischargeable pursuant to the allegations of any pending adversary proceedings ....

This language is clear. Neither provision contravenes the other. Were there ambiguity, it must be resolved for Delp. Harvison was the Plan drafter. Considering the widespread disagreements in case law, the Plan either (a) agrees with Delp's position outright, or, conversely, (b) shows ambiguity, so that ¶¶ 4.10 & 9.01 must

be read in favor of Delp's keeping the listed-as-exempt properties.

28. A third reason *Bartleson* fails to assist Nu-Way is because it was *criticized* in pertinent part by a *subsequent* panel of the *same court*. *Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177 (9th Cir. B.A.P. 2003). For example, *Brotby* disagrees with *Bartleson* as to the predicate of the statutory language. *Id.* at 188. "An interpretation of § 1141(d)(2) that an individual debtor's plan can in no fashion modify the rights of a creditor holding a claim excepted from discharge would effectively grant that creditor a veto over the reorganization process. ... Section 1123(b)(1) provides that a debtor's plan may impair, or in other words, *modify* the rights of creditors." *Id.* at 189 (emphasis added).

29. This leaves to be determined whether some sort of "injunction" had to be incorporated into this Plan to effect the Delp IRA exemption. The first indicia in that respect is that here we are not dealing with efforts of a debtor to defeat creditors' rights, but creditors out to defeat the debtor's rights. This affects the sort of language needed to be encompassed in the Plan to accomplish the exemption. Second, this is not a "time and methodology" constraint which would be dictating to the creditor the methodology or timing of how it might go about collection, but merely an *acknowledgment* of what was already the case anyway, that Delp could keep Delp IRA as exempt from the outset.

30. Finally, *Bartleson* invokes the *state law* of the geographic forum for its contractual analysis. 253 B.R. at 84. Texas State contract law does not allow for any "magic words." *Cf. Steinkamp v. Caremark*, 3 S.W.3d 191, 194-95 (Tex. App.–El Paso 1999, pet. denied) ("With regard to incorporation by reference, magic language is not necessary; *it is only necessary that the party makes the court aware of that particular evidence to which the party is referring.*" (emphasis added); *Hooks v. Davis*, No. 03-03-00739-CV; 2004 Tex. App. LEXIS 6830 at *6 (Tex. App.–Austin July 29, 2004, pet. denied) (argument that exhibits not be allowed "because they did not use the magic language of

'incorporated by reference' ... [is] reject[ed]") (citation omitted). It is clear from the plain language of the Plan that Delp was to keep Delp IRA. That is sufficient.

F. ACCOUNTING MISHAPS DO NOT DETERMINE THE STATUS OF PROPERTY.

31. Nu-Way postulates that because various trustees of Delp IRA did not know how to list any property pertinent to the FFRE Transaction (a malady common to the lawyers in this case), Delp IRA lost its exempt status. This is squarely contradicted by *Ancira v. C.I.R.*, No. 425-01; 119 T.C. 135; 2002 U.S. Tax Ct. LEXIS 43 at *11 (2002) ("[Previously] we held that bookkeeping error by the trustee of an IRA, which resulted in a portion of a rollover distribution from another qualified plan not being credited as the IRA account within the applicable period, did not preclude the rollover. ... We noted that 'a bookkeeping error does not alter the rights and responsibilities between parties to a transaction. ... The worst that could be said is that there was an oversight.") (cite omitted).

G. MISCELLANEOUS CASES.

The following are other authorities of Nu-Way, with Delp's responses:

1. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 838 (Tex. 2005). The statement quoted (IRAs "must be held by a third-party trustee to maintain their preferential tax status") is entirely dictum, a comment made in passing. Nevertheless, it does not go to the present situation. No circumstance of litigation, and property being retained in the court's registry *by the consent of the parties*, was involved there. The Registry of the Court held it here. The matter comes down to, at most, an *uncertainty* how the interest in the Units, or the judgment, or the secured claim, should be reflected. This is inadequate as a ground to turn over Delp IRA to Nu-Way. However, regardless the protection as to the IRA *per se*, Nu-Way contractually said Delp could retain it.

2. *In re Zenone, supra*, 278 B.R. 792, 795 (Bkrtcy. E.D. Ark. 2002). "The issue in this case is whether [Debtor] may *amend* his exemptions to include an IRA account not previously scheduled as exempt." *Id.* 793. Delp is not seeking to *amend* his schedules. He is only seeking to *maintain* the exempt assets and their treatment under the Plan that *Harvison* originally granted to him. *Zenone* is irrelevant.

3. *Mertz v. Rott*, 955 F.2d 596 (8th Cir. 1992). There the bankruptcy judge properly denied a discharge in a Chapter Seven bankruptcy proceeding because the debtor failed to list in the schedules to his bankruptcy petition state's tax refunds that he anticipated receiving and did receive." *Id.* at 596. Delp did not "anticipate" the FFRE Transaction when he filed his schedules. Instead, Delp IRA was *properly listed,* and properly exempted. Thereafter it did *not* matter what Delp did with Delp IRA afterwards. Whereas, *false swearing* could be a ground to defeat the debtor's *discharge*. *Id.* at 597-98. Delp neither has nor is seeking a discharge from Nu-Way's claim. *Mertz* is totally irrelevant to the bankruptcy issues in this case.

4. *Central States, Southeast v. Central Cartage Co.*, 76 F.3d 114, 116 (7th Cir. 1996), *cert. denied*, 519 U.S. 811 (1996). Obviously this is a foreign case, so it is only "instructional," not precedent. It *does* hold that the fee award goes to the client, not the attorney. However, the court only says that "*[m]ost* fee-shifting statutes ... direct the award to the litigant rather than the lawyer." Therefore, it is recognized that situations *can* exist–and they do here–where fee shifting to *counsel* is appropriate (shown above). Nowhere could such a fee more properly go to counsel directly than when a creditor has depleted the asset it agreed to leave to the debtor in an effort to improperly drain that asset for its judgment, or for spite against the debtor in a never-ending grudge match. There is no per se rule that fees can *never* be shifted, just as much as there is none that they *must* be. It is in the sound exercise of the District Court under bankruptcy principles.

5. *Benitez v. Genaro Collazo-Collazo*, 888 F.2d 930,

933 (1st Cir. 1989). This case only holds that there is no direct right to fees to counsel *under a specific statute based on its language*. *Id.* Again, this is unremarkable. The only question for *this* case is whether any governing principles, statutory or otherwise, preclude the award the trial court made in the exercise of its sound discretion. The answer is that there is not. As already shown, there is case law showing that attorneys' fees *can* be directed to counsel in appropriate federal and bankruptcy cases, and that is one of the alternative sources for the fee award below. The rationale for such awards is given in the properly cited *Marre* case, just as espoused in Delp's initial brief at 47-48. *Marre v. HP-84 Nursery Associates, Inc.*, 117 F.3d 297; 97-2 U.S. Tax Cas. (CCH) P50,573; 80 A.F.T.R.2d (RIA) 5523 (5th Cir. 1997). The bottom line is, there *is* authority to so award the fee, and there is no *controlling* authority which says this Court must reverse the award here. Delp and his Counsel are *not fighting over who is supposed to get the award* as between themselves. Rather, Nu-Way is attempting to *interfere* as an interloper. This should not be allowed. [n.3]

——footnote 3——

3 And, in any event, even if the award goes entirely to Delp rather than to Counsel, there must not be any *offset* for the reasons previously argued in Delp's earlier briefs.

——end footnote 3——

WHEREFORE, Nu-Way having no defense to the Plan's terms, nor any other defense to liability, including as to attorneys' fees, the Judgment should be **AFFIRMED**.

Respectfully submitted,

/s/Mack Ed Swindle
MACK ED SWINDLE
TBA # 19587500

THOMAS F. HARKINS, JR.
TBA # 09000990

* * * [Omit Firm Identification]

ATTORNEYS FOR DEFENDANT/ APPELLEE DELP

* * * [Omit Certificate of Service, February __, 2006, signed by Thomas F. Harkins, Jr.]

11 Extracts from Billy R. Delp's Petition for Review to Texas Supreme Court:

NO. 0600916

The Supreme Court of Texas

BILLY R. DELP, JR.,

Petitioner,

V.

NU-WAY ENERGY CORPORATION,

Respondent.

On Petition for Review From the
Tenth Circuit Court of Appeals of Texas at Waco
No. 10-05000065-CV

BILLY R. DELP, JR.'S
PETITION FOR REVIEW

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* * * [Omits other formal portions and Tables.]

* * * [Only portions directly related to arguments here raised are included. Review by Texas Supreme Court is discretionary and not a prerequisite for the Petition for Writ here; therefore, no arguments therein were necessary to preserve error.]

ISSUES PRESENTED

* * * [Omits Issue One]

ISSUE TWO:

The court of appeals abused its discretion in holding that the Delp IRA lost its state law exemption because it improperly applied the law to the facts.

ISSUE THREE:

The court of appeals abused its discretion when it concluded that the doctrines of *res judicata* and collateral estoppel did not bar Nu-Way's claims against Delp.

* * * [Further issues omitted; Statement of Facts omitted as the facts are already set out in items above and would be redundant here.]

SUMMARY OF THE ARGUMENT

* * * [Argument on standard of review omitted.]

The Court of Appeals erred in concluding that during the bankruptcy proceedings the Delp IRA lost its state law exempt status because of Delp's conduct as an individual bankrupt. The Delp IRA, a separate entity, exchanged cash for the Economy Oil

judgment. The fact that the Bankruptcy Court determined Nu-Way's claim against Delp individually was a non-dischargeable debt goes only to whether Nu-Way's claim would survive Delp's bankruptcy. That determination does not go to defeating the Delp IRA and its assets as being exempt from pre-petition debts, even if the debt is non-dischargeable.

The Court of Appeals also abused its discretion in determining that the doctrines of *res judicata* or collateral estoppel did not prevent Nu-Way from collecting its nondischargeable claim from Delp post-petition.

ARGUMENT

* * * [Argument on standard of review omitted.]

II. The Court of Appeals Abused its Discretion in Holding that the Delp IRA Lost its State Law Exemptions Because it Improperly Applied the Law to the Facts.

The Delp IRA was exempt when created and when listed in Delp's Bankruptcy Schedule "C." A2:13 ¶¶ 2 and 5. While Delp's bankruptcy was pending in December 1992, the Delp IRA purchased the Economy secured debt package for $250,000.00. These funds came from Delp IRA not Delp individually. A2:13 ¶ 16. Accordingly, while Delp's Chapter 11 bankruptcy was pending, the IRA, a separate entity, exchanged cash for the Economy note and the guarantee which became part of the Delp IRA. Thus, this property deemed to be exempt under the Bankruptcy Plan are [*sic*] exempt, even to Nu-Way's non-dischargeable debt. *See Rice v. Parks*, No. 98CV00731; [1999 U.S. Dist. LEXIS 21229] (M.D.N.C. Nov. 9, 1999) *aff'd* without opinion, 243 F.3d 539 (4th Cir. 2001) *** (the entire property listed as exempt in the debtor's bankruptcy proceeding was protected from the creditor's present attempts to collect the non-dischargeable pre-petition debt). A judgment holder is not free to issue execution (or other legal process) on the exempted property. *Rice, Id.* at *9-11 (citation omitted). It is the nature of property

which determines its exemption, not that of the debt.

Accordingly, Nu-Way is not entitled to collect against the Delp IRA as it existed when the bankruptcy was filed, nor can it collect from the traceable proceeds. *See In re Ladd*, 258 B.R. 824 (Bkrtcy. N.D. Fla. 2000); *In re Alam*, 336 B.R. 320, 325 (Bkrtcy. N.D. Ohio 2005); *In re Lubecki*, No. 05-10416B; 2005 Bkrtcy. LEXIS 1787 at * 12 (Bkrtcy. W.D.N.Y. Sept. 29, 2005).

Nu-Way argues that the Delp IRA is not exempt from its judgment debt under bankruptcy Code §1141(d)(2). However, that section goes to preserving the non-dischargeable debt, not what properties the creditor might seize to satisfy that debt. The plain meaning of the statute should be conclusive. *See In re Box*, 324 B.R. 290, 293 (Bkrtcy. S.D. Tex. May 4, 2005) (citation omitted); *See* [*sic*] *also 1993 Custom Van*, No. 07-9700254-CR 1997 Tex. App. LEXIS 6364 at * 5 (Tex. App. Amarillo Dec. 10, *no writ hist.*) (not designated for publication). Generally, when a statute specifically enumerates matters, that specificity is tantamount to excluding those matters not listed. *See Custom Van* at * 6. Thus, by saying "debt" but not "property" the statute means the debt remains recoverable but the property exemptions stand as to that and all other pre-petition debt. *See* Bankruptcy Code §1141(d)(2).

A majority of courts hold that a post-petition change in the property's character claimed as exempt will not change the status of the property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring post-petition can change that fact. *See Reed v. Yochem, (In re Reed)*, 184 B.R. 733, 737 (Bkrtcy W.D. Tex. 1995) (citation omitted). *See also Cisneros v. Kim (In re Kim)* 257 B.R. 680, 689 (9th Cir. BAP. 2000), *aff'd* without Opin.) [*sic*] (9th Cir. 2002).

Nu-Way argues that *Reed* does not apply because its rule governs only pre-petition creditors whereas its non-dischargeable status elevated it to post-petition status. First, there is nothing that deprived the Delp IRA of its exempt status even as to post-petition creditors. Second, the effect of the bankruptcy statute is not to

override any exemptions (or boost a pre-petition creditor to post-petition status [*sic*], but only to preserve the collectibility of the non-dischargeable debt.

III. *Res Judicata* or Collateral Estoppel Preclude Nu-Way's Turnover Claims.

* * * [Discussion re mootness omitted.]

However, because Nu-Way sought turnover of the Delp IRA in its entirety to satisfy Nu-Way's judgment, the court of appeals concluded that the rest of Nu-Way's claims were not moot. The court of appeals then held that neither *res judicata* nor collateral estoppel barred Nu-Way from pursuing its turnover. The court of appeals improperly applied the law in reaching these conclusions.

There are two *res judicata* analyses in this case, one federal and one state. Because the prior proceeding involving the Delp IRA exemption was in a federal bankruptcy court, federal law governs whether *res judicata* barred litigation in the state court. *See Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990). * * * [State law rule as to intervening State Court Judgment omitted.]

Under federal law, the doctrine of *res judicata* applies if: (1) the parties are identical; (2) the prior judgment is rendered by a court of competent jurisdiction; (3) there is a final judgment on the merits; and (4) the claims are identical. *See Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979). Here, the parties were Nu-Way and Delp. The bankruptcy court judgment approving the plan Nu-Way proposed as to exempt property was rendered by a court of competent jurisdiction. That judgment is final on the merits as to exempt property set aside to Delp as to the debtor. The exempt property includes the Delp IRA. The claim Nu-Way asserts against Delp in this proceeding is the same as asserted against Delp in the bankruptcy court.

However, Nu-Way argues that it had no knowledge that the Delp IRA had exchanged cash for the Economy secured package. It argues that Delp concealed the exchange from it and the other creditors. Nu-Way, a bankruptcy creditor and a participant in proposing and having the plan confirmed, knew it would be bound by the plan regardless of what particular it did or did not know. The plan, as perceived and confirmed by Nu-Way, provided that Delp should be entitled to retain his personal property schedules [*sic*] as exempt under Schedule C – which included the Delp IRA. Accordingly, Nu-Way participated in an agreement which allowed an exclusion from collection. Nu-Way also retained [*sic*] other benefits from the bankruptcy estate it would not have otherwise had absent the plan it pushed. Nu-Way claims it received no benefit from the plan itself. However, the court's findings as well as the plan show that Nu-Way did receive benefits including a right to Mrs. Delp's properties, payment to Class 9 creditors which included Nu-Way and the settling or dismissing of claims favorably to Harvison's group and detrimental to Delp. Additionally, Delp was not obliged to report nor did he have a duty to report the IRA's purchase of the Economy package when it occurred.

Thus, under federal law, Nu-Way's claim is barred by *res judicata*. Because the court of appeals applied the wrong standard of review, its contrary conclusion is an abuse of discretion.

* * * [Discussion of *res judicata* resulting from intervening State Court Judgment omitted.]

Collateral estoppel also bars Nu-Way's claims against the Delp IRA and Delp individually. Collateral estoppel, or issue preclusion, prevents re-litigation of particular issues already resolved in a prior suit. *See Barr*, 837 S.W.2d at 628; *Bonniwell v.Beech Aircraft Corp.*, 663 S.W. 2d 816, 818 (Tex. 1984). That the Delp IRA was exempt and set aside to Delp as exempt property in his Chapter 11 Reorganization plan was litigated in the bankruptcy court and decided by the confirmation of the plan and the bankruptcy court's final judgment on that plan. Accordingly,

Nu-Way's claims are barred by collateral estoppel.

* * * [Balance of Petition for Review omitted.]

Respectfully submitted,

/s/James A. Baker
James A. Baker
TBA # 00000033
Hughes & Luce, LLP

* * * [Further Counsel Identification Omitted; Certificate of Service by James A. Baker, with permission, November 22nd, 2006, omitted.]

12 Extracts from Billy R. Delp's Motion for Rehearing of Petition for Review to Texas Supreme Court:

NO. 0600916

The Supreme Court of Texas

BILLY R. DELP, JR.,

Petitioner,

V.

NU-WAY ENERGY CORPORATION,

Respondent.

On Rehearing of Petition for Review From the
Tenth Circuit Court of Appeals of Texas at Waco

No. 10-05000065-CV

BILLY R. DELP, JR.'S MOTION FOR REHEARING PETITION FOR REVIEW

* * * [Omits other formal portions and Tables.]

ISSUES ON REHEARING

A. PRIMARY ISSUE - EFFECT OF THE BANKRUPTCY.

Bankruptcies affect thousands of people every year. Both debtors and creditors need to know whether bankruptcy exemptions bind creditors with nondischargeable debts. Equally important is the issue of whether a chapter 11 plan binds all parties to its terms. This court has the unique opportunity to establish clear rules on these crucial issues in Texas.

1. Nondischargeability of Bankruptcy Debt Does Not Defeat Code § 523(l) Exemption.

Here, Delp was forced into a Chapter 11 bankruptcy by his former partner and now adversary, Harvison. Harvison controls several companies, including Nu-Way. Harvison and his companies, including Nu-Way, filed numerous proofs of claims in Delp's Chapter 11 proceeding. Harvison drafted a plan (Petition Appx Tab "O") which was confirmed by cramdown. Nu-way's claim against Delp was held to be nondischargeable. The Confirmed Plan took all of Delp's assets, except it allowed Delp to keep the exempt property Delp listed in Schedule "C." Appx Tab "K." Schedule "C" included Delp's IRA, the asset that is the subject of this appeal.

Nu-Way argues that neither listing property as exempt nor

as an exemption in a bankruptcy plan restrains creditors with nondischargeable debts from attaching that exempted property. However, the Bankruptcy Code provides that "confirmation of a plan does not discharge any individual debtor from any *debt* excepted from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2) (emphasis added). Accordingly, post bankruptcy, Delp's "debt" to Nu-Way is intact. But property *exempt* when the Chapter 11 was filed remains exempt from pre-petition creditors such as Nu-Way, regardless of whether the debts are nondischargeable.

In construing a legislative provision, "a statute's plain meaning should be conclusive . . ..." *In re Box*, 324 B.R. 290; 2005 Bankr. LEXIS 753 at *8 (Bkrtcy. S.D. Tex. May 4, 2005) (citation omitted). Another 'fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005) (citation omitted). "[T]he natural meaning of these terms provides a clear answer." *Arthur Anderson LLP v. United States*, 544 U.S. 696, 705 (2005) (citations omitted) (unanimous decision by Rehnquist, C.J.) Likewise, if the statute uses a *specific* term, this excludes any *general* inference. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 916 (9th Cir. 2005) (discussing the basic principle of statutory construction that the specific prevails over the general). *See also Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 779 (9th Cir. 2006).

By saying "debt," but not "property," Congress meant any *property exemptions* should stay in place, but the *debt* remains *recoverable*.

> [B]y combined operation of § 522(c) and the Settlement Agreement [comparable to the Plan here, which is a settlement] entered in this case, the entire property listed as exempt in Parks' Chapter 7 proceeding was protected from Rice's present attempt to collect the *nondischargeable*

> prepetition debts owed to him by Parks. . . . [P]ursuant to § 522(c), creditors' rights to collect those nondischargeable prepetition debts are subordinate to the debtor's rights in property exempted in the bankruptcy case. . . . As has been noted, § 522(c) produces a "curious result." "The judgment holders are free to obtain a postpetition execution against the debtor's non-exempt . . . property. However, they are not free to issue execution on the exempted property. They will, therefore, have to wait for the debtor to acquire additional property to satisfy their claim. Now, under the mandate of § 522(c) that property is not available to Rice, the holder of a prepetition debt, albeit a nondischargeable debt."

Rice v. Parks, No. 1:98CV00731; 1999 U.S. Dist. LEXIS 21229 at *9-11, 26 (M.D.N.C. Nov. 9, 1999) *aff'd w/o opinion*, 243 F.3d 539 (4th Cir. 2001) (emphasis added; citations omitted).

Further, construing nondischargeable claims as *always* "outside the ambit of the bankruptcy case" is inconsistent with the Code. Under the Bankruptcy Code debtors *are* discharged on debts categorized as *nondischargeable*, "unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge . . .." *See* 11 U.S.C. § 523(c). *See Bank of Louisiana v. Pavlovich (In re Pavlovich)*, 952 F.2d 114, 116 (5th Cir. 1992) ("The bank . . . waived its right to file a complaint objecting to discharge or dischargeability by not timely raising these issues before confirmation."). Recognizing the Code's requirement, Nu-Way filed a "Complaint to Determine Dischargeability of Debt" in Delp's bankruptcy. Appx Tab "N."

The Delp IRA was listed as exempt in Schedule "C" (Appx Tab "K"), and no one timely objected. Thus, the Delp IRA was made exempt. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). All traceable proceeds in the Delp IRA are exempt from

prepetition creditors on prepetition debts. *Lowe v. Reed (In re Reed)*, 184 B.R. 733 (Bkrtcy. W.D. Tex. 1995). Therefore, under the statute's plain language, the Delp IRA and its traceable proceeds are free from collection on prepetition debts. Whether the debt later became determined "nondischargeable" is irrelevant to the exemption's efficacy. The creditor can still try to collect on the nondischargeable debt, but only from the debtor's postpetition non-exempt property. *See Rice, supra.*

Taylor binds this Court. *See Penrod Drilling corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (*per curium*) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court.") (emphasis in original; citations omitted).

In *Taylor*, it was conceded that the debtor actually had no valid exemption, 503 U.S. at 642. But the Court still allowed the exemption because it was listed without a timely objection as the statute and rules require. *Id., and see, id.* at 643-44. Here, Nu-Way conversely concedes the exemption was *valid* when made. *Taylor* emphasizes the need for "finality." *See Taylor*, 503 U.S at 644. *Taylor* holds that subsequent developments cannot undo the finality of a Schedule "C" exemption not timely challenged. *Taylor,* 503 U.S. at 644. No bankruptcy provision undertakes to "retract" the exemption that Section 522(l) allows. Thus, there is no basis for undoing the exemption Section 522(l) grants, predicated on subsequent events, even if a debt is subsequently declared nondischargeable or a post-petition prohibited transaction occurs.

This court must follow *Taylor* about the effect of bankruptcy law on exemptions established under § 522(l). *Penrod*, 865 S.W.2d at 296. Thus, this Court's decision on the issue is important to the jurisprudence of the State, and would control all State decisions on this issue. Therefore, this Court should take this case and resolve whether Delp's § 522(l)

exemption stands against Nu-Way as a prepetition creditor, regardless of the fact that Nu-Way's prepetition debt was later determined to be nondischargeable.

2. Participating in a Bankruptcy Binds the Creditor to the Terms of the Plan.

Equally as important, Nu-Way participated in Delp's bankruptcy in a *quid pro quo* arrangement. Regardless of Nu-Way's obligation to participate in the bankruptcy, it *chose* to. A creditor may not actively interact with the debtor's case for the creditor's benefit, yet escape all consequences. Nu-Way involved itself extensively in Delp's bankruptcy, and obtained benefits which it would *not* have obtained otherwise. [n.1] The "quid pro quo" was that Nu-Way agreed it could *not* attach the properties listed in Schedule "C." Plan ¶ 4.10 (Appx Tab "O"). In other words, there was consideration to bind Nu-Way to the Plan settlement that evolved into the Bankruptcy Court's Order confirming the Plan that Nu-Way, through privy Harvison, proposed.

——footnote 1——

1 Indisputable facts illustrate Nu-Way's involvement and benefits: (a) Harvison has been co-principal of Nu-Way for decades, both represented by the same counsel; (b) Nu-Way filed proofs of claim in Delp's bankruptcy; (c) Harvison had his Plan confirmed in Delp's bankruptcy; (d) Nu-Way is twice listed as a creditor entitled to participation and release of claims against it; and (e) Nu-Way was granted rights against Mrs. Delp's properties on its claims as well as against all properties of Mr. Delp (except Schedule "C"). Appx "L", "M", "O", and "V". Nu-Way's current posture–no benefit in participating under the Plan–is belied by Nu-Way's going to so much trouble to craft, participate under, and obtain confirmation of the Harvison Plan.

——end footnote——

A prime example of this "participation" rule is an institutional creditor with unquestionably nondischargeable debts–the IRS, recovering on tax liens. Despite that status, the IRS participating in bankruptcies *modifies* IRS' collection opportunities from what they would have been without that participation. As the Bankruptcy Court in the Southern District of California held:

> . . . [T]he IRS concludes a confirmed plan has no effect on the IRS' ability to assess and collect its non-dischargeable taxes outside the plan. . . . Here, the IRS chose to participate in the plan, negotiating with debtors and reaching agreement on a filing schedule for missing returns. It . . . agreed to the form of the confirmation order after hearing and filed its proof of claim according to the agreed procedures. Now it wants to be free to pursue other determination and collection techniques as though it had never submitted a claim under the bankruptcy case. *It argues that the confirmed plan specifically included the text of § 1141(d)(2) and therefore excludes non-dischargeable taxes from its operation.*
>
> . . . *Although a plan cannot discharge the debt, it may otherwise subject the debt to its provisions.* . . . "Stated another way, § 1141(d)(2) preserves the right of a creditor holding a nondischargeable debt to full payment. It does not provide that the provisions of a confirmed plan cannot affect the rights of such a creditor ...."
>
> In the case at hand, the IRS had full opportunity to participate in the plan process, and it chose to represent to the Court that it was satisfied with the agreed procedures for determining the amount of its nondischargeable claim, which effectively modified the

> creditor/debtor relationship. . . . The IRS has subjected itself to this court's jurisdiction and should not be allowed to object at this late date .... the court finds the IRS is bound to the procedures . . . in the confirmed plan . . ..

Martin v. United States (*In re Martin*) 150 B.R. 43, 46-47 (Bkrtcy. S.D. Cal. 1993) (emphasis added; citation omitted). *But see Tudisco v. United States (In re Tudisco)*, 183 F.3d 133, 138-139 (2nd Cir. 1999).

Paralleling *Martin*, here we have:

(a) a creditor with a nondischargeable debt;
(b) voluntarily subjecting itself to the bankruptcy court's jurisdiction;
(c) filing proofs of claim;
(d) aligned and in privity with the Plan's proponent; and
(e) benefitting [n.2] from being included in its Plan provisions (including the right to Mrs. Delp's properties, to which it had no legal right, *In re Nahat*, 278 B.R. 108, *passim* (Bkrtcy. N.D. Tex. 2002) (creditors cannot reach spouse's assets), and exemption from potential liability for its own acts), *regardless what actually eventuated therefrom.*

See, e.g., Plan **¶¶ 4.09, 4.10, & 5.03** (Appx Tab "O"). [n.3] Nu-Way should be restricted to collect its nondischargeable debt from assets other than Delp IRA, just as the Plan provides, as Nu-Way "settled" for that arrangement. *Accord, Rice, supra*, at *29 ("a creditor cannot both accept the benefits of a settlement agreement and thereafter object to the exemptions that the settlement agreement grants the debtor").

—footnotes 2 & 3—

2 Nu-Way suggests Delp conceded Nu-Way has not benefitted from the bankruptcy. All Delp conceded is he did not pay anything to Nu-Way. Certainly, however, Nu-Way benefitted from its participation.

3 Applying *Martin* in this case is more compelling than in *Martin* because, here, Nu-Way, the *creditor,* crafted the plan.

----end footnotes----

See also United States v. Black, 44 Collier Bankr. Cas. 2d (MB) 1; 85 A.F.T.R.2D (RIA) 1846; 2000 U.S. Dist. LEXIS 5880 at *15-21 (D. Ariz. March 30, 2000) (concluded that although an IRS lien is nondischargeable, because the IRS participated in the Plan, the Court ruled for the debtor, the plan being *res judicata).*

To recap, Nu-Way received extensive benefits or legal entitlements, regardless whether they ever actually inured or not, under the Plan. The Harvison "Associated Group" (a) adopted oppressive terms against Delp, providing Delp only what Harvison thought Delp would be able to retain anyway; (b) made Delp's wife's property susceptible to collection; (c) avoided potentially revealing, costly litigation with the prospect of exposure of their own misdeeds against Delp; and (d) placed themselves ahead of Delp in the event of any collections.

Nu-Way seeks to capture one last possession, the Delp IRA. Implicitly Nu-Way seeks to modify the plan, whereby ¶ 4.10 would *add*, "except for nondischargeable debts." Nu-Way could have added that term, but did not. Therefore, Nu-Way is bound by the Plan the Bankruptcy Court approved. *But see In re Howell*, 84 B.R. 834 (Bkrtcy. M.D. Fla. 1988) (holding a creditor can never be constrained in its nondischargeability rights by what it does in the case or what the plan provides).

However, *Howard* [*sic*] has been criticized:

The issue is whether Jokay may be

> enjoined by the terms of the Plan from executing on any nondischargeable judgment it might obtain outside the parameters of the Plan. . . .
>
> Section 1141(d)(2) excludes from discharge "any debt" excepted from discharge under § 523. Under § 101(11) of the Bankruptcy Code, "debt" is defined as a liability on a claim. Section 101(4) defines "claim" to mean a right to payment. Section 1141(d)(2), therefore, excepts from discharge the right to payment on a liability that is found to be nondischargeable under § 523. Stated another way, § 1141(d)(2) preserves the right of a creditor holding a nondischargeable debt to full payment. It does not provide that the provisions of a confirmed plan cannot affect the rights of such creditor or that, as the bankruptcy court in *In re Howell*, 84 Bankr. 834 (Bankr. M.D. Fla. 1988) stated, " . . . [A] creditor who has a debt excepted from discharge under section 523 cannot be bound by the provisions of a confirmed plan." *Id.* at 836. Frankly, I disagree with the *Howell* court's approach of broadly applying § 1141(d)(2). An expansive interpretation is inconsistent with the statutory language and imposes unwarranted limitations on debtors seeking to reorganize under Chapter 11. I also suggest that such an approach is inconsistent with the views of the Supreme Court as expressed in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990).

In re Mercado, 124 B.R. 799, 801-02 (Bkrtcy. C.D. Cal. 1991).

Just as before, this is all the more reason this Court should take this case, to give guidance to Texas courts in resolving claims of creditors with nondischargeable debts against properties exempted from collection in bankruptcy plans. This is precisely

the determination needed in this case.

* * * [Balance relating to State law issues omitted.]

Respectfully submitted,

/s/James A. Baker with permission by MES
JAMES A. BAKER * * * [Further Counsel Identification and Certificate of Service by Mack Ed Swindle on February 15th, 2007, omitted.]

End of
Part 2–Proof of Issues Raised (Items 7-12)

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Part 3–Other Materials (Items 13-21)

(Following)

13 *In re Billy Ray Delp, Jr.*, Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. Nov. 18, 1991) (Schedule C of Debtor Delp's Chapter 11 Schedules):

In re Billy Ray Delp, Jr., Debtor — Case No. 491-44581

SCHEDULE C – PROPERTY CLAIMED AS EXEMPT

* * *

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT

			DEDUCTING EXEMPTION
* * *			
Individual Retirement Account at TexasComm-Bank, Fort Worth (rollover)	Tex Prop Code § 42.0021	1,118,138	1,118,138

* * * [Omit balance of Schedules]

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY
BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 40 sheets, and that they are true and correct to the best of my knowledge, information and belief. (Total shown on summary page plus 1.)

Date November 13, 1991 Signature:/s/Billy Ray Delp, Jr.
Debtor
Billy Ray Delp, Jr.

* * * [Balance of Declaration Page omitted]

14 *In re Billy Ray Delp, Jr.*, Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. March 11, 1992) (Pertinent Extracts from Nu-Way's Proofs of Claims):

[1]

United States Bankruptcy Court NORTHERN DISTRICT OF TEXAS	**PROOF OF CLAIM**

In re (Name of Debtor) BILLY RAY DELP, JR.	Case Number 491-44581-MT-11

Name of Creditor

* * *

Nu-Way Oil Company

* * *

Name and Addresses Where Notices Should be Sent

Nu-Way Oil Company
c/o 7HBF, Ltd. shareholder
2801 Glenda Avenue
Fort Worth, Texas 76117

Telephone No. 817-831-0761

* * *

1. BASIS FOR CLAIM:

* * *

XX Money loaned

* * *

2. DATE DEBT WAS INCURRED: money was loaned on account over period of time through 1987

* * *

4. CLASSIFICATION OF CLAIM.

* * *

XX UNSECURED NONPRIORITY CLAIM $ 131,000.00

* * *

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED $ 131,000.00 *** (Unsecured) | $ 131,000.00 (Total)

* * *

* * *

Date	Sign and print the name and title, if any of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)
3/11/92	/s/ Stephanie Martin Klein Stephanie Klein, attorney and authorized agent

* * *

[2]

United States Bankruptcy Court NORTHERN DISTRICT OF TEXAS	**PROOF OF CLAIM**

In re (Name of Debtor) BILLY RAY DELP, JR.	Case Number 491-44581-MT-11

Name of Creditor
* * *
Nu-Way Oil Company

X Check box if you are are aware that anyone else has filed a proof of claim. ***

* * *

Name and Addresses Where Notices Should be Sent
Nu-Way Oil Company
c/o 7HBF, Ltd. shareholder of
Nu-Way, Inc.
2801 Glenda Avenue
Fort Worth, Texas 76117

Telephone No. 817-831-0761

* * *

1. BASIS FOR CLAIM:

* * *

X Other (Describe briefly) Tort damages for breach of fiduciary duty, misapplication and mismanagement of corporate assets.

* * *

2. DATE DEBT WAS INCURRED:
over period of years up through 1991

* * *

4. CLASSIFICATION OF CLAIM.

* * *

X UNSECURED NONPRIORITY CLAIM $ unliquidated tort claim, subject of pending suit

* * *

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED $ unliquidated, pled for at least $15,000.00 (Unsecured)

unknown, at least (Total) $15,000

* * *

* * *

Date	Sign and print the name and title, if any of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)
3/11/92	/s/ Stephanie Martin Klein Stephanie Klein, attorney and authorized agent

* * *

[3]

United States Bankruptcy Court NORTHERN DISTRICT OF TEXAS	**PROOF OF CLAIM**
In re (Name of Debtor) BILLY RAY DELP, JR.	Case Number 491-44581-MT-11
Name of Creditor * * * Nu-Way, Inc. and Nu-Way Distributing Company	X Check box if you are are aware that anyone else has filed a proof of claim. ***
* * * **Name and Addresses Where Notices Should be Sent** Nu-Way, Inc. and Nu-Way Distributing Company c/o 7HBF, Ltd. shareholder of Nu-Way, Inc. 2801 Glenda Avenue Fort Worth, Texas 76117 Telephone No. 817-831-0761	

* * *

1. BASIS FOR CLAIM:

* * *

X Other (Describe briefly) Tort damages for breach of fiduciary duty, misapplication and mismanagement of corporate assets, self-dealing and theft of corporate opportunity

* * *

---

2. DATE DEBT WAS INCURRED:
between 1982 and 1991

* * *

---

4. CLASSIFICATION OF CLAIM.

* * *

X UNSECURED NONPRIORITY CLAIM $ unliquidated tort claim pled for at least $1,593,000

* * *

---

5. TOTAL AMOUNT OF CLAIM
AT TIME CASE FILED $ 1,593,000.00
(Unsecured) ***

$1,593,000.00 unliquidated, pled for

* * *

---

* * *

Date	Sign and print the name and title, if any of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)
3/11/92	/s/ Stephanie Martin Klein

* * *

15 *In re Billy Ray Delp, Jr.*, Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. January 29, 2003) (Pertinent Extracts from Harvison's Fourth Amended Plan of Reorganization):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
BILLY RAY DELP, JR.	§	
A/K/A BILLY RAY DELP	§	CASE NO. 491-44581-
A/K/A BILLY R. DELP	§	MT-11
A/K/A BILLY DELP	§	CHAPTER 11
	§	
DEBTOR	§	
S.S. NO. 455-50-0525	§	

HARVISON'S FOURTH AMENDED
PLAN OF REORGANIZATION
DATE: JANUARY 27, 1993

Creditors, HBF Financial, Ltd. and John Harvison ("Plan Proponents"), hereby propose the following Plan of Reorganization ("Harvison's Plan") pursuant to Chapter 11 of the United States Bankruptcy Code in lieu of the plans previously filed by John Harvison on April 20, 1992 and by HBF Financial, Ltd. and John Harvison on October 01, 1992 and December 01, 1992.

ARTICLE I
DEFINITIONS

The following terms, when used in Harvison's Plan, shall, unless otherwise indicated as the context requires, have the following meanings:

* * *

1.02 "Associated Group" consists of John Harvison, Nu-Way Oil Company, Nu-Way Distributing Company, FFP Operating Partners, L.P., Dynamic Production, Inc., Dynamic Industries, Inc., H.D.S. Enterprises, Inc., and Oakview, Ltd.

* * *

1.04 "Claim" shall mean a right of payment from the Debtor's Estate which is evidenced by a timely filed proof of claim which is allowed by the Court, or if a proof of claim is not filed by the creditor, a right which otherwise appears in the Debtor's Bankruptcy Schedules and (i) has not been resolved by Final Order of the Court in this Reorganization Case, or (ii) is not scheduled as disputed, contingent or unliquidated.

1.05 "Class" shall mean any class into which Claims are classified pursuant to Article II of Harvison's Plan.

1.06 "Confirmation Date" shall mean the date on which the Court signs an order confirming Harvison's Plan ***.

* * *

1.08 "Creditors" shall mean all creditors of the Debtor holding claims for debts, liabilities, demands or claims of any character whatsoever, as defined in Section 101(5) of the Bankruptcy Code. [Emphasis added.]

1.09 "Debtor" or "Debtor-in Possession" shall mean Billy Ray Delp, Jr.

1.10 "Effective Date" shall mean the eleventh day following the date of the Order Confirming Harvison's Plan ***.

1.11 "Estate" shall mean the bankruptcy estate created by the commencement of the Reorganization Case.

* * *

1.20 "Litigation claims" shall mean litigation claims asserted by the Debtor individually and in a derivative capacity against Plan Proponents, the Associated Group, the Related Entities ***.

1.25 "Pro Rata" shall mean, in connection with distribution to Class 8 Claims, out of the first one million three hundred thousand dollars ($1,300,000) of the Trust Estate, (after payment of all allowed administrative and priority tax claims, Class 1, and post confirmation expenses, including Liquidating Trustee fees and expenses), a distribution to each holder of a Class 8 Claim in the same proportion that the allowed amount of said claim bears to the total of all Class 8 allowed claims; in connection with distribution to Class 8 Claims out of all other Trust Estate property, a distribution to each holder of a Class 8 Claim in the same proportion that the allowed amount of said claim bears to the unpaid balance of all Class 8 allowed claims and to all Class 9 allowed claims. In connection with distribution to Class 9 Claims, a distribution to each holder of a Class 9 Claim in the same proportion that the allowed amount of said claim bears to the total of all Class 9 allowed claims, plus the balance of all allowed Class 8 claims, to the extent the allowed Class 8 claims are not paid out of the first one million three hundred thousand dollars ($1,300,000) of Trust Estate.

1.26 "Related Entities" consist of H.D.S. Enterprises, Inc., H.D.S. Development, Inc., Dynamic, Inc., H.D.S., Inc., John

D. Harvison, Randall W. Harvison, Holly Beth Harvison, Kay Harvison Parker, Michael E. Harvison, Hope Harvison, Associated Properties, Thrift Distributors, Inc., Thrift Wholesale Company, FFP Partners Management Company, Inc., Robert J. Byrnes, John W. Hughes, Robert E. Garrison, II, J. D. St. Clair, Garland R. McDonald, Hi-Lo Distributors, Inc., Gas-N-Sav, Inc., Dynamic Production, Inc., Nu-Way Oil Company, Nu-Way Distributing Company, Nu-Way Energy Corporation, Enterprise Distributing, Inc., Stacey Harvison Woodcock, Larry Hove, Sue Harvison, Swifty Distributors, Inc., Dick Williams, S. H. Enterprises, James D. Stevens, Thrift Distributors Energy, Inc., Cayce Enterprises, J.R.J. Venture, Inc., M. E. Smith Company, John R. Rochelle, Venture 77, Ltd., Val-U-Distributors, Inc., Southway, Inc., Hi-Lo Corporation, Gas-A-Way Distributor, Inc., Estate of Robert W. St. Clair, deceased, State Gas and Oil, Inc., ThriftWay, Inc., Estate of Rosamond Harvison, deceased, 7HBF, Ltd., Dynamic Industries, Inc., FFP Operating Partners, L.P., and Oakview, Ltd.

1.27 "Trust Estate" shall mean all property of Debtor's Bankruptcy Estate, including any causes of action currently existing or arising out of the operation and management of the Trust Estate, pursuant to 11 U.S.C. §541, excluding Debtor's exempt property and excluding property securing allowed secured claims of the Class 3 and 5 Secured Claimants.

1.28 "Unsecured Claim" shall mean the Claim of any Creditor of the Debtor other than a Secured Claim ***.

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

* * *

2.08 Class 8 - Claims of General Unsecured Creditors, including the Claim of HBF Financial, Ltd. pursuant to an assignment of the Sunbelt Savings, FSB judgment, by the Resolution Trust Corporation, excluding any unsecured claims of the Associated Group.

2.09 Class 9 - Claims of the "Associated Group".

2.10 Class 10 - Interest of the Debtor and Debtor's spouse.

* * *

ARTICLE IV
TREATMENT OF CLAIMS AND INTEREST UNDER THE PLAN

* * *

4.08 Class 8 Claims of General Unsecured Creditors, including the HBF Financial, Ltd. claim pursuant to assignment of the Sunbelt Savings, FSB Judgment by the Resolution Trust Corporation, but excluding any claims by the Associated Group, are impaired under Harvison's Plan. Pursuant to the terms of the Settlement Agreement, HBF Financial, Ltd., will share with the Resolution Trust Corporation any funds recovered from Debtor's bankruptcy estate, as a result of HBF Financial, Ltd.'s proof of claim. This Class is believed to have claims of approximately $3,879,986. This Class shall be paid their allowed Claims on a Pro Rata basis from the first one million three hundred thousand dollars ($1,300,000) in the Trust Estate, after the Effective Date as funds are available for distribution by the Liquidating Trustee after payment in full of administrative and priority tax claims and Class 1 Claims, and any fees and expenses of administration of the Liquidating Trust. In addition, Class 8 Claims, to the extent not paid from the first one million three hundred thousand dollars ($1,300,000) of the Trust Estate, shall share Pro Rata with allowed Class 9 Claims in any and all of the Trust Estate in excess of one million three hundred thousand dollars ($1,300,000). The Liquidating Trustee will be in charge of determining the amount and timing of distribution, as well as the extent of funds which will be held in reserve to satisfy priority claims and/or disputed unsecured claims against the Estate. Distribution shall be made as soon as practical. This class is impaired.

4.09 Class 9 Claims consist of the unsecured claims of the Associated Group. Class 9 Claimants shall be paid their allowed claims on a Pro Rata basis with allowed Class 8 Claims from any excess of one million three hundred thousand dollars ($1,300,000) in the Trust Estate. Class 9 shall be subordinated to Class 8 in the first one million three hundred thousand dollars ($1,300,000) in the Trust Estate. Claims of this class are believed to be approximately $5,870,000, plus undetermined, unliquidated claims. This Class is impaired.

4.10 Class 10 consists of the interest of the Debtor and the Debtor's spouse and is impaired under Harvison's Plan. The Debtor and the Debtor's spouse shall be entitled to **retain** their homestead, subject to all valid liens, and their personal property **scheduled as exempt under Schedule C** of the Debtor's Schedules of Assets and Liabilities. The Debtor and the Debtor's spouse shall retain no non-exempt assets, except to the extent the net proceeds of liquidation exceeds all allowed claims, including interest to the date of payment, which excess, if any, shall be paid to the Debtor.[3]

ARTICLE V
CREATION OF THE TRUST

5.01 Creation of the Liquidating Trust. As of the Confirmation Date a Liquidating Trust shall be created for the purpose of liquidating all the nonexempt assets of the Debtor's Bankruptcy Estate, excluding any property securing the allowed secured claims of Class 3 and 5 Secured Claimants, (the "Trust Estate"), and satisfying all claims pursuant hereto (hereinafter referred to as the "Liquidating Trust").

* * *

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3 Emphasis added here.

5.03 The Liquidating Trustee. Michael Harrison shall be appointed Liquidating Trustee by the Court for the purpose of implementing and administering Harvison's Plan. The Liquidating Trustee shall manage the Trust Estate and the Liquidating Trust until all of the Liquidating Trust Property is sold, liquidated, compromised, distributed to the creditors, or otherwise utilized, pursuant to the provisions of Harvison's Plan. Plan Proponents will ask the Court for an Order detailing the mechanics of an orderly liquidation of the Debtor's estate. Subject to the terms, conditions, and requirements of such Order, the Liquidating Trustee shall liquidate the Trust Estate as follows. The Liquidating Trustee shall sell all assets comprising the Trust Estate, except for the Trust Estate's interest in Economy Oil Company stock, and shall sell, settle or compromise all litigation claims against John Harvison, the Related Entities *** and any and all other litigation claims of the Debtor, within ninety (90) days from the Effective Date. The Liquidating Trustee shall administer the Trust Estate and the Liquidating Trust for the benefit of Class 8 and Class 9 Creditors until all Claims are resolved, and all assets are liquidated, compromised, distributed to creditors, or otherwise utilized, pursuant to the provisions of Harvison's Plan at which time the Liquidating Trustee shall submit a final report to the Court, which shall enter a Final Decree closing the Reorganization Case. The Liquidating Trustee shall not be authorized to accept any credit bids for sale of any assets of the Trust Estate. Within ninety (90) days of the Effective Date, the Liquidating Trustee shall conduct public auctions for the sale of all assets of the Trust Estate, except for the Economy Oil Company stock. Said public auctions shall be for cash and shall be conducted only after fourteen (14) days written notice to all creditors and parties in interest of the date, time, and place of said auctions. All sales will be final and will not require approval by the Court. ***

5.04 Duties and Powers of Liquidating Trustee. The Liquidating Trustee *** shall:

* * *

(I) Sell and/or compromise any and all causes of action, claims or counterclaims belonging to the Trust Estate that are reasonably likely to yield funds to the Trust Estate ***;

* * *

(K) Reserve from distributions to Class 8 and Class 9 Creditors such sums as may be necessary to cover claims of Class 8 and Class 9 Creditors which are disputed, contingent or unliquidated;

(L) Take charge of and vote all shares of corporate stock owned by the Trust Estate and any and all proxy rights held by the Debtor and the Trust Estate, including, without limitation, all shares of stock of the Trust Estate in Economy Oil Company, H.D.S., Inc., Dynamic, Inc., Nu-Way, Inc., H.D.S. Development, Inc., and Mummert Farms;

(M) Vote to remove the Debtor as a director on all corporations of which Debtor is a director on Confirmation Date, including, without limitation all corporations listed in ¶ 5.04(L) above, and nominate and vote for himself as a director or to nominate and vote for any other person as a director, provided, however, the Liquidating Trustee shall not be permitted to nominate and vote for the Debtor or any member of the Debtor's immediate family;

(N) Exercise all rights to participate in and vote in the management of an partnership interest of the Trust Estate ***.

* * *

ARTICLE VI
MEANS FOR EXECUTION OF PLAN

6.01 Sale and Disposition of Assets. Subject to any Order detailing the mechanics of an orderly liquidation of the Debtor's estate, *** the Liquidating Trustee shall, within 90 days

after the Effective Date, sell, liquidate, settle or compromise, surrender, or abandon any and all tangible and intangible assets and causes of action of the Trust Estate.

6.02 Distribution to Creditors. *** The surplus of the sale of the collateral, if any, will be used by the Liquidating Trustee to pay administrative expenses, priority tax claims, Class 1 Creditors, Class 8 and Class 9 Creditors.

* * *

ARTICLE VII
EXECUTORY CONTRACTS

7.01 All executory contracts and leases which existed as of the Filing Date between Debtor and any individual entity are rejected unless expressly assumed by the Liquidating Trustee within 90 days of his appointment. ***

* * *

ARTICLE IX
GENERAL PROVISIONS

9.01 The confirmation of Harvison's Plan shall discharge the Debtor from any dischargeable claims that arose before the date of confirmation, and any debt of a kind specified in Section 502(a), (h) or (i) of the Bankruptcy Code, provided however, the discharge shall not discharge the Debtor from any **claims**[4] which are ultimately determined by the Court to be nondischargeable pursuant to the allegations of any pending adversary proceedings which are currently pending before the Court.

9.02 The Court shall retain and have all the jurisdiction

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4 Emphasis added here.

conferred upon it by the Bankruptcy Reform Act of 1978, including all amendments thereof now existing or hereafter arising and all amendments made to Title 28 of the United States Code after October 1, 1979. In addition, the Court shall have such jurisdiction as is otherwise conferred upon it by law, rule, or statute or Act of Congress by H.R. 5174, the "Bankruptcy Amendments and Federal Judgeship Act of 1984," by any other legislation or by Harvison's Plan until all allowed Claims are fully satisfied and discharged pursuant to the provisions herein. Without limiting the foregoing in any way, the Court shall retain jurisdiction of this case after Confirmation in respect to the following matters:

* * *

G. To resolve any disputes over the meaning of the provisions of Harvison's Plan ***

9.03 Upon the date of entry of the Order Confirming Harvison's Plan, the provisions of Harvison's Plan shall bind the Debtor and ***any*** **Creditor**[5], whether or not such Creditor has accepted Harvison's Plan, pursuant to Section 1142 of the Bankruptcy Code.

DATED this 27 day of January, 1993.

Respectfully submitted,

/s/John Harvison
John Harvison

HBF FINANCIAL. LTD.

By: /s/J. D. St. Clair
J. D. St. Clair, Manager

---

5 Emphasis added here.

16 *In re Billy Ray Delp, Jr.*, Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. April 6, 1993)) (Order Confirming Plan):

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	)	
	)	
BILLY RAY DELP, JR.	)	**CASE NO. 491-44581-**
a/k/a BILLY RAY DELP	)	**MT-11**
a/k/a BILLY R. DELP	)	**CHAPTER 11**
a/k/a BILLY DELP	)	
Debtor	)	
	)	
Social Security No.	)	
455-50-0525	)	

ORDER CONFIRMING PLAN

The "Harvison's Fourth Amended Plan of Reorganization" ("the Plan") filed by **HBF Financial, Ltd. and John Harvison** dated January 27, 1993, as modified by a "Modification of Harvison's Fourth Amended Plan of Reorganization Dated January 27, 1993," dated March 3, 1993 ("the Modification")[6], having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for Confirmation set forth in 11 U.S.C. Section 1129(a) and 11 U.S.C. Section 1129(b) have been satisfied;

IT IS ORDERED that:

---

6 Not relevant to any issue herein; not included in this Appendix.

The Plan and the Modification are confirmed. A copy of the confirmed Plan and Modification are attached hereto as Exhibits "A" and "B."

IT IS FURTHER ORDERED that all fees and expenses of the Liquidating Trustee shall be subject to approval of the Court.

* * *

IT IS FURTHER ORDERED that any and all sales by the Liquidating Trustee shall be pursuant to an "orderly liquidation."

Dated: April 6, 1993

BY THE COURT

/s/Massie Tillman
Massie Tillman
United States Bankruptcy Judge

17 *7HBF, Ltd., Nu-Way, Inc., Nu-Way Oil Company, and Nu-Way Distributing Company v. Billy Ray Delp, Jr.*, (*In re Billy Ray Delp, Jr.*), Adv. No. 492-4030; Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. June 12, 1996) (Pertinent Excerpts from Second Amended Complaint to Determine Dischargeability of Debt):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE: §
§
BILLY RAY DELP, JR. § CASE NO. 491-44581-MT-11

	§	
DEBTOR.	§ Chapter 11	

7HBF, LTD., NU-WAY, INC.,	§	
NU-WAY OIL COMPANY, AND	§	
NU-WAY DISTRIBUTING COMPANY	§	
	§	ADV. PROC. NO.
PLAINTIFFS,	§	492-4030
	§	
V.	§	
	§	
BILLY RAY DELP, JR.	§	
	§	
DEFENDANT.	§	

SECOND AMENDED COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

TO THE HONORABLE MASSIE TILLMAN,
U.S. BANKRUPTCY JUDGE:

Now come 7HBF, Ltd., Nu-Way, Inc., Nu-Way Oil Company, and Nu-Way Distributing Company ("Plaintiffs")[7] and file this, their Second Amended Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. §523(a)(4) and §523(a)(6), and in support thereof, would respectfully show the court as follows:

JURISDICTION AND PARTIES

1. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

---

7 Latter now Nu-Way Energy Corporation. Stip. ¶ 9; App 60.

2. Plaintiff, 7HBF, Ltd. ("7HBF"), is a Texas limited partnership, which brought this complaint against the Debtor, Billy Ray Delp, Jr., ("Delp"), as a derivative action. The real parties in interest are Nu-Way, Inc., Nu-Way Oil Company and Nu-Way Distributing Company (collectively the "Nu-Way Entities"). Since the case was stayed in 1992, ownership of each of the Nu-Way Entities has changed. The new management of each of the Nu-Way Entities supports the derivative action originally brought by 78HBF and accordingly, the Nu-Way Entities join in this action. ***

3. Defendant, Billy Ray Delp, Jr. is the individual Debtor in this bankruptcy case. ***

BACKGROUND FACTS

4. During the times of the transactions stated below, and continuing at all times until at least July of 1992, Delp was a member of the board of directors and president of Nu-Way, Inc., Nu-Way Distributing Company ("Nu-Way Distributing"), and Nu-Way Oil Company ("Nu-Way Oil"). Delp and/or his family owned or controlled Browder Distributing Company ("Browder") and Roadside Stations, Inc. ("Roadside"). ***

* * *

6. On or about November 30, 1982, however, Roadside and Browder were indebted to Texas American Bank, Fort Worth, Texas and to American Petrofina ("Fina") in a combined approximate amount in excess of one million dollars. Delp was personally liable for the debts to Texas American Bank. At that time, Roadside and/or Browder could not continue in business without payment of their obligations to Fina. While acting as president and director of each of the Nu-Way Entities, Delp knowingly and intentionally caused fuel and/or related products to be sold from Nu-Way Distributing for an inadequate consideration, in violation of Delp's fiduciary duties to Nu-Way, Inc. and Nu-Way Distributing. Additionally, he knowingly and

intentionally allowed the indebtedness of Browder and Roadside to the Nu-Way Entities to increase to nearly $1,500,000.00, beyond their abilities to repay, while at the same time making substantial reductions of their indebtedness to Texas American Bank and Fina.

7. Although some fuel and related products sold by Nu-Way Distributing may have been paid for by Roadside and Browder, Plaintiffs would show, on information and belief, that the sales of fuel and/or related products from Nu-Way Distributing to Roadside and Browder complained of herein, were for no consideration whatsoever.

8. As of the date of this complaint, Browder owes Nu-Way Distributing $198,361.00 and Roadside owes Nu-Way Distributing $1,225,963.00. These amounts have been determined in state court, reduced to judgment, and are now final. Neither Browder nor Roadside is able to pay such debts to Nu-Way Distributing. In fact, Roadside is now a debtor in a Chapter 7 proceeding pending in the U.S. Bankruptcy Court for the Eastern District of Texas. Nu-Way Distributing anticipates that it will have a deficiency in excess of $1,000,000 after the liquidation of Roadside's estate.

9. Additionally, Delp has committed willful, intentional, and malicious acts of waste of the assets of Nu-Way Oil including, without limitation, the unauthorized expenditure of attorneys' fees to bring massive litigation unrelated to any legitimate business purpose of the Nu-Way Entities. More specifically, in May 1990, Delp employed counsel and instituted litigation in the name of Nu-Way Oil without any express or implied authority to do so, expending at least $15,000.00 in attorneys' fees. Such acts of waste by Delp violated his fiduciary duty to the Nu-Way Entities, proximately causing damage to said companies in excess of $15,000.00.

10. In his capacity as an officer of each of the Nu-Way Entities, Delp has breached his fiduciary duties, has willfully,

intentionally, and maliciously mismanaged each of the Nu-Way Entities and has wrongfully used the assets of each of the Nu-Way Entities for his own personal benefit and gain. His intentional conduct includes use of Nu-Way personnel to further his personal business, without compensation to the company; use of corporate funds to pay personal club memberships and other personal entertainment expenses without compensation to the company; and advances of money from the corporation to himself and to related persons and entities, some of which money remains unpaid.

11. More specifically, between November 1986 and February 1987, Delp, while president of Nu-Way Oil, caused $100,000.00 to be transferred from Nu-Way Oil to Delp and Ward Properties, a partnership or other entity in which Delp owned a one-half interest. Nu-Way Oil received no consideration whatsoever for such transfer. 7HBF and Nu-Way Oil's new management learned of this transfer in late 1992. Such money was ostensibly for the purchase of Nu-Way Oil, from Delp and Ward Properties, or from Delp and Weldon G. Ward, of property on John T. White Road. In 1985, however, Delp and Weldon G. Ward had granted the Bank of Commerce a first lien on such property, which was still in force in 1986, when Delp executed a contract for deed both as president of Nu-Way Oil, Purchaser, and personally, with Weldon G. Ward, as Seller. Delp never caused such contract for deed to be recorded. The property was never conveyed to Nu-Way Oil, the money was never returned, and in 1990, the Bank of Commerce sold the property at foreclosure.

12. Additionally, by the afore-described conduct, Delp, as an officer of each of the Nu-Way Entities, has engaged in self-dealing, has misappropriated and wasted corporate assets and corporate opportunities willfully, intentionally, and maliciously, has wrongfully committed unlawful and/or ultra vires actions and has intentionally exceeded his authority. As a result of Delp's conduct, each of the Nu-Way Entities has been damaged greatly and the value of the business and assets of each has depreciated considerably.

13. The conduct of Delp described above was intentional and constitutes self-dealing, theft of corporate opportunity, breach of Delp's fiduciary duty, and fraud or defalcation while acting in a fiduciary capacity to each of the Nu-Way Entities. In the alternative, such conduct constitutes willful and malicious injury to the Nu-Way Entities and/or to the property of such corporations. Said conduct by Delp has proximately caused damage to Nu-Way Distributing in an amount in excess of $1,200,000, and caused damage to Nu-Way Oil in an amount in excess of $115,000.

14. Plaintiffs bring this Second Amended Complaint for determination that such damages are nondischargeable under 11 U.S.C. §523(a)(6) and/or under 11 U.S.C. §523(a)(4) as a debt for willful and malicious injury by Delp to each of the Nu-Way Entities and/or to their property, and/or as a debt for fraud while acting in a fiduciary capacity, embezzlement, or larceny.

CAUSE OF ACTION UNDER §523

15. As a direct and proximate result of the aforementioned conduct, the Nu-Way Entities have been damaged, for which damages Plaintiffs here sue, seeking determination that the actual damages are nondischargeable under 11 U.S.C. §523(a)(6) as debts for willful and malicious injury by Delp to the Nu-Way Entities and/or to their property. Additionally and/or alternatively, Plaintiffs seek determination that said damages are nondischargeable under 11 U.S.C. §523(a)(4) as debts for fraud while acting in a fiduciary capacity. Additionally and/or alternatively, Plaintiffs seek determination that said damages are nondischargeable under 11 U.S.C. §523(a)(4) as debts for embezzlement or larceny.

16. The wrongs done by Delp as a director and president of the Nu-Way Entities were aggravated by that kind of willfulness, wantonness, and malice for which the law allows the imposition of exemplary damages. Delp acted intentionally, willfully, wantonly, without justification or excuse, and with

reckless disregard for his fiduciary duties to each of the Nu-Way Entities. Therefore, Plaintiffs seek exemplary damages and seek determinations that same are likewise nondischargeable under the above-referenced statutes.

17. Plaintiffs have incurred attorneys' fees and costs in asserting their claims for which Plaintiffs here sue.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, 7HBF, Nu-Way, Inc., Nu-Way Oil Company, and Nu-Way Distributing Company, pray that they be awarded their actual damages, exemplary damages, costs, and attorneys' fees against Delp and that the awards be declared nondischargeable, and for such other and further relief, both general and special, at law and in equity, to which they are entitled.

Respectfully submitted,

/s/Anne Soward
FRANK HILL
ANNE SOWARD
STEFANIE MARTIN KLEIN
KERRY McLAIN

HILL, GILSTRAP ***

* * * [Certificate of Service signed by Anne Soward on June 12, 1996, omitted.]

18 *7HBF, Ltd., Nu-Way, Inc., Nu-Way Oil Company, and Nu-Way Distributing Company v. Billy Ray Delp, Jr.*, (*In re Billy Ray Delp, Jr.*), Adv. No. 492-4030; Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. August 21, 1996) (Judgment Determining Debt to be Nondischargeable):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
BILLY RAY DELP, JR.	§	CASE NO. 491-44581-MT-11
	§	
DEBTOR.	§	Chapter 11

7HBF, LTD., NU-WAY, INC.,	§	
NU-WAY OIL COMPANY, AND	§	
NU-WAY DISTRIBUTING COMPANY	§	
	§	ADV. PROC. NO.
PLAINTIFFS,	§	492-4030
	§	
V.	§	
	§	
BILLY RAY DELP, JR.	§	
	§	
DEFENDANT.	§	

JUDGMENT DETERMINING DEBT TO BE NONDISCHARGEABLE

On June 12, 1997, the above styled adversary proceeding came on for trial. Plaintiffs appeared and announced ready. Defendant failed to appear in person or by counsel. Accordingly, the Court enters the following judgment by default based on Exhibits 1-54 offered by Plaintiffs and admitted by the Court and the Affidavits of A. Bruce Wilson and Randall W. Harvison submitted by Plaintiffs, and in conformity with the findings of fact and conclusions of law entered in this matter.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Plaintiff Nu-Way Distributing Company have judgment against Billy Ray Delp, Jr., in the amount of $1,820,

072.73, together with interest from the date of this judgment, and that Plaintiff Nu-Way Oil Company have judgment against Billy Ray Delp, Jr., in the amount of $250,292.52 together with interest from the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the foregoing judgment amounts are hereby determined to be nondischargeable pursuant to 11 U.S.C. § 523.

SO ORDERED.

SIGNED this 21st day of August, 1997.

/s/Massie Tillman
HONORABLE MASSIE TILLMAN
U.S. Bankruptcy Judge

19 *7HBF, Ltd., Nu-Way, Inc., Nu-Way Oil Company, and Nu-Way Distributing Company v. Billy Ray Delp, Jr.*, (*In re Billy Ray Delp, Jr.*), Adv. No. 492-4030; Case No. 491-44581-MT-11, (Bkrtcy. N.D. Tex. August 21, 1997) (Findings of Fact and Conclusions of Law Relating to Default Judgment):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
BILLY RAY DELP, JR.	§	CASE NO. 491-44581-MT-11
	§	
DEBTOR.	§	Chapter 11

7HBF, LTD., NU-WAY, INC.,	§
NU-WAY OIL COMPANY, AND	§

NU-WAY DISTRIBUTING COMPANY	§	
	§	ADV. PROC. NO.
PLAINTIFFS,	§	492-4030
	§	
V.	§	
	§	
BILLY RAY DELP, JR.	§	
	§	
DEFENDANT.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DEFAULT JUDGMENT

On June 12, 1997, this Court rendered default judgment in favor of Plaintiffs in the above-referenced adversary proceeding. The Court makes the following findings of fact and conclusions of law with respect to such judgment pursuant to Bankruptcy Rule 7052.

Findings of Fact

1. On November 4, 1991, Billy Ray Delp, Jr. ("Delp") filed a voluntary Chapter 11 petition, thereby commencing Bankruptcy Case No. 491-44581-MT-11. Delp's Chapter 11 case remains pending.

2. This adversary proceeding began on February 7, 1992, when 7HBF, Ltd. ("7HBF") filed a complaint to determine dischargeability of a debt under 11 U.S.C. §§ 523(a)(4) and (6) against Delp, Nu-Way Inc., Nu-Way Oil Company and Nu-Way Distributing Company. 7HBF also filed a timely proof of claim in Delp's Chapter 11 bankruptcy case regarding the sums at issue in this adversary proceeding.[8] 7HBF brought this adversary proceeding derivatively, joining Nu-Way, Inc., Nu-Way Oil

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8 Nu-Way's nondischargeability judgment is for prepetition debt. App 39.

Company and Nu-Way Distributing Company (the "Nu-Way entities") as real parties in interest necessary to the prosecution of the case.

* * *

4. On July 22, 1992, this adversary proceeding was stayed (pending confirmation of a plan) by an agreed order entered in Delp's bankruptcy case.

5. On April 6, 1993, this Court confirmed a Chapter 11 liquidating plan in Delp's bankruptcy case. Both the District Court and the Fifth Circuit affirmed the confirmation order. The confirmed plan expressly provided that Delp was not discharged "from any **claims** which are ultimately determined by the Court to be nondischargeable pursuant to the allegations of any pending adversary proceedings which are currently pending before the Court." Confirmed Plan, ¶ 9.01. [Emphasis added here.]

6. After a plan was confirmed, the agreed stay was no longer in effect. This Court then denied Delp's motions to strike and to dismiss and granted 7HBF's motion for leave to file an amended complaint. During the time the adversary proceeding was stayed, the management of each of the Nu-Way entities changed. The new management of each entity supported the derivative action and sought leave to join the adversary proceeding as Plaintiffs. This leave was granted in this Court's order granting 7HBF's motion for leave to file a second amended complaint. On June 12, 1996, 7HBF and the Nu-Way entities filed their Second Amended Complaint, and on August 29, 1996, Delp filed his amended answer.

* * *

14. Plaintiffs appeared and announced ready for trial.

15. On June 12, 1997, after Delp's failure to appear when this case was called for trial, the Court entered a default

against Delp.

16. The Court admitted into evidence Exhibits 1-54 offered by Plaintiffs, and the Affidavits of A. Bruce Wilson and Randall W. Harvison filed by Plaintiffs in support of their damage awards.

17. On June 11, 1993, Nu-Way Distributing obtained a judgment in the 141st Judicial District Court of Tarrant County, Texas, against Roadside Stations, Inc. ("Roadside"), and Browder Distributing ("Browder"). The principal amount of the Roadside judgment is $1,225,963.80, which represents the value of fuel Delp caused to be sold to Roadside by Nu-Way Distributing. The principal amount of the Browder judgment is $198,361.23, which represents the value of fuel Delp caused to be sold to Browder by Nu-Way Distributing.

18. Interest on the Roadside judgment at the rate of 10% per annum, compounded daily, calculated through June 12, 1997, totals $603,861.31. Interest on the Browder judgment at the rate of 10% per annum, compounded daily, calculated through June 12, 1997, totals $97,704.90.

19. In breach of his fiduciary duties to Nu-Way Distributing, Delp failed to collect and/or fraudulently attempted to write off Roadside's debt to Nu-Way Distributing. Delp also actively contested Nu-Way Distributing's efforts to obtain a judgment against Roadside. In breach of his fiduciary duties to Nu-Way Distributing, Delp failed to collect and/or fraudulently attempted to write off Browder's debt to Nu-Way Distributing. Delp also actively contested Nu-Way Distributing's efforts to obtain a judgment against Browder.

20. Nu-Way Distributing incurred legal expenses of $15,153.39 in obtaining its judgments against Roadside and Browder. Nu-Way Distributing incurred legal expenses of $24,907.87 in successfully opposing Roadside's appeal of the judgment. Nu-Way Distributing incurred $3,030.65 in legal fees

to the firm of Hill Gilstrap and $37,089.58 in legal fees to the firm of Land, Ray for legal services in the Roadside bankruptcy to collect on both the Roadside and Browder judgments. These legal fees were necessitated by Delp's breaches of fiduciary duty to Nu-Way Distributing.

21. Nu-Way Distributing will recover not more than $436,000.00 in distributions in the Roadside bankruptcy, up to $424,000.00 of which may be attributable to the Roadside judgment and up to $12,000.00 of which may be paid on a claim assigned to Nu-Way Distributing by Browder, and would therefore be attributable to the Browder judgment. Beyond these anticipated recoveries in the Roadside bankruptcy, Nu-Way Distributing has no reasonable expectation of recovering any further moneys from Roadside or Browder on the above-referenced judgments. The remaining amounts owing, including the above-described attorneys' fees, are debts for Delp's defalcation while acting in a fiduciary capacity, and are for willful and malicious injury by Delp **to Nu-Way Distributing.**[9]

22. In breach of his fiduciary duties, Delp caused Nu-Way Oil to enter into a contract for deed with the partnership of Delp and Ward, under which Nu-Way Oil paid $101,025.42 to such partnership. Delp never recorded such contract, and, when all money owing under the contract had been paid by Nu-Way Oil, breached his fiduciary duties further by failing to obtain a deed to such property from Delp and Ward. Bank of Commerce foreclosed on the property on June 1, 1990. Interest on $101,025.42 at the rate of 10% per annum, compounded daily, calculated from June 1, 1990 through June 12, 1997, totals $103,120.99. These amounts are debts for Delp's defalcation while acting in a fiduciary capacity, embezzlement, or larceny, and for willful and malicious injury by Delp **to Nu-Way Oil.**[10]

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9 Emphasis added here.

10 Emphasis added here.

23. Delp caused Nu-Way Oil to pay $10,000.00 to the law firm of Gardere & Wynne on April 25, 1990, in breach of his fiduciary duties. Also, $5,836.15 in attorneys fees were incurred in suing Gardere & Wynne to recover such amounts. These legal fees were necessitated by Delp's breach of fiduciary duty to Nu-Way Oil. The settlement of the lawsuit with Gardere & Wynne left $7,500.00 of the $10,000.00 paid by Nu-Way Oil still unpaid. Interest on $7,500.00 at the rate of 10% per annum, compounded daily, calculated from April 25, 1990 through June 12, 1997 is $7,809.96. These amounts are debts for Delp's defalcation while acting in a fiduciary capacity, embezzlement or larceny, and for willful and malicious injury by Delp **to Nu-Way Oil.**[11]

24. Plaintiffs' attorneys' fees for the prosecution of this adversary proceeding over the past five years, including the preparation for trial, and the preparation of findings of fact and conclusions of law, have totaled approximately $75,000.

25. Delp's nondischargeable debt to Nu-Way Distributing is $1,820,072.73, including $1,068,506.52 in actual damages, $701,566.21 in pre-judgment interest, and $50,000.00 in exemplary damages.

26. Delp's nondischargeable debt to Nu-Way Oil is $250,292.52, including $114,361.57 in actual damages, $110,930.95 in pre-judgment interest, and $25,000.00 in exemplary damages.

Conclusions of Law

27. This Court has jurisdiction over the subject matter of this adversary proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

* * *

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11 Emphasis added here.

32. Entry of default established Delp's liability.

33. Default having been entered, each of Plaintiff's allegations of fact must be taken as true and each of their claims must be considered established as a matter of law. ***[12]

34. It is a proper exercise of judicial power for a court, upon default, by taking evidence when necessary, or by computation from facts of record, to fix the amount which the prevailing party is lawfully entitled to recover and to give judgment accordingly. ***

35. Any pre-judgment interest on a nondischargeable debt to which Plaintiffs may be entitled under state law will also be nondischargeable. ***

36. Such pre-judgment interest on a nondischargeable debt continues to accrue post petition. ***

37. If a creditor is entitled to attorneys' fees under state law because of a debtor's actions that render the underlying debt nondischargeable under 11 U.S.C. §523(a)(4) or 523(a)(6), the debt for those attorneys' fees is also nondischargeable.

38. Plaintiffs are entitled to recover for attorneys' fees and other litigation expenses of previous suits which they were required to prosecute against third parties as a result of Delp's wrongful conduct. ***

39. An action for breach of fiduciary duties under Texas law falls within the category of claims for which equitable pre-judgment interest can be awarded. *** Such interest is merited in this case.

40. This Court is required, in applying Texas law to

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12 All citations to authorities are omitted, as here.

the debt action, to fix the rate of pre-judgment interest of the prevailing rate that exists on the date of [*sic*] judgment is rendered, according to the provisions of article 5069-1.05, §2. ***

41. This Court is required to order that the pre-judgment interest be compounded daily. ***

42. Plaintiffs' punitive damages are nondischargeable under § 523(a)(6), because the Court finds that the nature of the underlying act, from which the punitive damages arose, involves willful and malicious conduct on the part of the debtor. ***

43. Punitive damages are nondischargeable to the extent they are imposed because of conduct violative of §523(a)(6). ***

44. Where appropriate, findings of fact shall be considered conclusions of law, and vice versa.

Signed: Aug 21, 1997.

/s/Massie Tillman
The Honorable Massie Tillman
United States Bankruptcy Judge

20 *FFP Partners, L.P., Plaintiff v. Billy R. Delp, Jr. and Economy Oil Company, Defendants; Billy R. Delp, IRA, Intervenor v. John H. Harvison, Third Party Defendant*, Cause No. 342-153149-94, 342nd Judicial District, Tarrant County, Texas (Sept. 24, 1998), *aff'd without published opinion*, (Tex. App.–Fort Worth June 8, 2000, pet. denied) (Pertinent Extracts from Judgment):

No. 342-153149-94

FFP Partners, L.P., § IN THE DISTRICT
§ COURT

v.	§	
	§	
BILLY R. DELP, JR. and	§	
ECONOMY OIL COMPANY,	§	
	§	342ND JUDICIAL
Defendants	§	DISTRICT
	§	
BILLY R. DELP, IRA,	§	
	§	
Intervenor	§	
	§	
v.	§	
	§	
JOHN H. HARVISON,	§	
	§	TARRANT COUNTY,
Third Party Defendant	§	TEXAS

JUDGMENT

This case was called to trial on April 6, 1998. Economy Oil Company ("Economy") appeared in person and by attorney and announced ready for trial. Billy R. Delp, Jr., both individually and on behalf of the Billy R. Delp Individual Retirement Account (the "Delp IRA"), appeared in person and by attorney and announced ready for trial. A jury consisting of twelve qualified jurors was empaneled, and the case proceeded to trial.

On April 27, after the parties had presented evidence and rested and closed, the court submitted questions of fact to the jury, and the jury deliberated and returned a verdict. *** Thereafter, Billy Delp Jr., and the Delp IRA moved for judgment on the verdict; and Economy moved for judgment notwithstanding the verdict and for a new trial.

The court granted Economy's motion for judgment notwithstanding the verdict with regard to the jury's answer to questions 8, 10 and 11 and ruled that the following facts were established as a matter of law:

(i) Economy is the owner of the 175,000 units of Class B limited partnership interests in FFP Partners, L.P., (the "FFP Units"), which are represented by certificates presently held in the registry of the court; and

(ii) The Delp IRA owns a secured interest for $350,000, with the FFP Units pledged as collateral.

* * *

IT IS THEREFORE, ORDERED, ADJUDGED, DECREED, AND DECLARED as follows:

(i) Economy is the owner of the FFP Units:

(ii) Economy is the owner of the 175,000 shares of FFP Marketing Company stock by a certificate presently held in the registry of the court;

(iii) Economy is the owner of all distributions related to the FFP Units presently in the registry of the court; and

(iv) Economy is the owner of all distributions and all other funds and property currently held in the registry of the court.

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED, that the Delp IRA owns a secured claim for $350,000, with the FFP Units, the FFP Market Company Stock, all distributions therefrom, and all interest on said distributions, pledged as collateral.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED , [*sic*] that the Delp IRA have judgment against Economy for the sum of $350,000, with post-judgment interest

thereon at the rate of ten percent (10%) per annum from the date of the judgment until paid, which post-judgment interest shall be compounded annually.

IT IS FURTHER ORDERED that the judgment of $350,000, with post-judgment interest thereon, if not paid by Economy, shall be paid and satisfied from the FFP Units, their distributions and interest earned from the distributions, all of which are currently held in the registry of the court, prior to any disbursement therefrom to Economy.

IT IS FURTHER ORDERED that upon full payment of the judgment and the post-judgment interest thereon, the judgment shall be satisfied, and the secured claim shall be extinguished.

* * *

The parties are allowed all writs to enforce this judgment.

SIGNED THIS 24th DAY OF SEPTEMBER, 1998.

/s/Bob McGrath
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

/s/Frank Gilstrap
Frank Gilstrap 07964000
Hill Gilstrap
* * *
Attorneys for Economy

/s/David Evans
David Evans 06713080
Bourland, Kirkman, Seidler & Evans, L.L.P.
* * *
Attorneys for Delp and the Delp IRA

21 *In re Billy R. Delp, Jr. IRA, Relator*, No. 2-05-065-CV; (Tex. App.–Fort Worth May 19, 2005, original proceeding) (not designated for publication) (Mandamus Conditionally Granted) (Pertinent Extracts) (Reported at 2005 Tex. App. LEXIS 3873):

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

No. 2-05-065-CV

IN RE BILLY R. DELP, JR. IRA RELATOR

ORIGINAL PROCEEDING

MEMORANDUM OPINION[13]

INTRODUCTION

Respondent, the judge of the 342nd District Court, denied Relator Billy R. Delp, Jr. IRA's motion to release registry assets and motion to compel post-judgment discovery and granted the motion for protective order of real party in interest Economy Oil Company (RPI). Because we hold that the trial court lacked jurisdiction to deny release of the registry assets, we conditionally grant mandamus relief.

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13 [Court's Footnote 1] *See* TEX R. APP. P. 47.4.

FACTUAL BACKGROUND

The 342nd case

In 1994, FFP Partners, L.P., filed a declaratory judgment action in the 342nd District Court against Billy R. Delp, Jr. and RPI to declare ownership of 175,000 shares of FFP Marketing Company common stock. Relator and John Harvison later became parties to the lawsuit. Because the parties disputed the ownership of the stock and the resulting income, the parties agreed to deposit cash and the stock into the registry of the trial court.

In June 1998, the parties filed a Rule 11 agreement that provided that the stock and cash would remain in the registry of the court pending the conclusion of the litigation. On September 24, 1998, the trial court signed the final judgment. The final judgment provided that RPI owned the stock but ordered that Relator recover a $ 350,000 judgment against RPI plus 10% per annum post-judgment interest and awarded Relator a secured claim for the $ 350,000 in the stock located in the registry of the court.

On June 8, 2000, this court affirmed the final judgment, and the Texas Supreme Court denied the petition for review. Mandate issued on July 21, 2001.

The 96th case

In 2000, Nu-Way Energy Corporation filed suit against Billy R. Delp, Jr. individually, but not Relator, in the 96th District Court and then filed a friendly garnishment suit against RPI. RPI and Nu-Way are sister corporations. RPI, however, acknowledges that they are virtually the same corporation. The two suits were consolidated. The basis of the suit was that (1) Nu-Way had a judgment against Delp individually, (2) Relator had a judgment against RPI, (3) Relator is not exempt, so (4) Delp owns Relator's judgment against RPI, and thus (5) Nu-Way can collect or garnish the judgment against RPI–that is, the stock. There is no evidence

in the record, however, that the registry was subject to the garnishment, only RPI is subject to it. Additionally, at no time were Nu-Way or RPI able to obtain prejudgment relief in the 96th district court to prevent the release of the registry assets in the 342nd district court to Relator, although they tried.

In April 2004, the consolidated suit was tried. The court ordered that Nu-Way take nothing and specifically found that Nu-Way has no interest in the assets in the registry of the 342nd District Court. Nu-Way has filed a notice of appeal.

Post-Judgment Activity in the 342nd

On August 30, 2004, after the 96th District Court had rendered judgment in the Nu-Way case but before the final judgment was signed, RPI had still not paid the judgment in the 342nd case. RPI filed a motion in the 342nd District Court to establish scheduling for distribution of the assets in the registry of the court, requesting that the court leave the assets in its registry until Nu-Way had exhausted all appeals in its case. In September 2004, Relator filed a plea to the jurisdiction in response to RPI's motion, contending that the 342nd District Court had lost plenary power to modify the 1998 judgment. The court agreed that it did not have jurisdiction to sign an order stating that its judgment would not be paid until a certain date.

In December 2004, Relator filed a motion for release of the registry assets. RPI responded, asking the court to allow it to supplement the registry of the court and to deny the release of the registry assets until Nu-Way has exhausted all appeals. The court denied the release. Because the trial court would not release the assets and RPI had not paid anything toward the judgment, Relator then requested post-judgment discovery from RPI. RPI refused to answer, so Relator filed a motion to compel discovery, and RPI filed a motion for protective order. The 342nd District Court denied the motion to compel and granted the motion for protective order.

RPI has not paid any amount toward the 1998 judgment. As of December 16, 2004, the total amount due under the final judgment was $ 423,978.47, which is held in the registry of the 342nd district court.

Relator now requests that we determine whether the 342nd District Court (1) may refuse to perform the ministerial act of disbursing registry assets to Relator, the judgment holder, based solely on the fact that another party (not a party to the action below) has filed a subsequent lawsuit, in another court, against a related non-judgment holder; (2) may impose additional conditions not in the final judgment or in the agreement of the parties after the trial court has lost jurisdiction to modify the final judgment; and (3) may refuse to enforce its own judgment and prevent the judgment holder from conducting post-judgment discovery to enforce the judgment?

DISCUSSION

Mandamus is an extraordinary remedy that will issue to correct a clear abuse of discretion only if the relator lacks an adequate remedy by appeal. 2 A party is entitled to mandamus relief to vacate an order that wrongly denies a prevailing party's attempt to enforce an unsuperseded judgment. 3 Furthermore, when a trial court's action is mandatory, mandamus is the appropriate remedy to compel the performance of the ministerial act. 4 A petition for writ of mandamus is also the proper way to seek review of a trial court's post-judgment discovery order. 5

---------- Footnotes ----------

2 *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002).

3 *In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003).

4 *In re Perritt*, 992 S.W.2d 444, 447 (Tex. 1999).

5 *In re Amaya*, 34 S.W.3d 354, 356 (Tex. App.–Waco 2001, orig. proceeding).

---------- End Footnotes----------

A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." 6 A trial court has no discretion in determining what the law is or applying the law to the facts. 7 Thus, a clear failure to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ. 8

---------- Footnotes ----------

6 *In re Hinterlong*, 109 S.W.3d 611, 621 (Tex. App.–Fort Worth 2003, orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839, 35 Tex. Sup. Ct. J. 468 (Tex. 1992)).

7 *Id.*

8 *Walker*, 827 S.W.2d at 840; *see also In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195-96, 45 Tex. Sup. Ct. J. 1229 (Tex. 2002).

---------- End Footnotes----------

ENFORCEMENT OF THE JUDGMENT

A trial court has an affirmative duty to enforce its judgment. 9 In the absence of a supersedeas bond, the clerk of the court has a duty to issue a writ of execution, upon application, beginning either thirty days after the judgment is signed, or thirty days after the overruling of a motion for new trial. 10 The act of issuing execution on a judgment is ministerial. 11

---------- Footnotes ----------

9 TEX. R. CIV. P. 306 (providing that "[t]he court shall cause its judgments and decrees to be carried into execution"); *Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d at 179.

10 TEX. R. CIV. P. 627; *Gonzales v. Daniel*, 854 S.W.2d 253, 256 (Tex. App.–Corpus Christi 1993, orig. proceeding).

11 *See Gonzales*, 854 S.W.2d at 256.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Additionally, absent a motion for new trial, a trial court has plenary power to vacate, modify, correct, or reform its judgment within thirty days after the judgment is signed. 12 When the court loses its plenary power at the expiration of the thirty days, it loses jurisdiction to modify the judgment. 13 The trial court retains authority to enforce its judgments, but its enforcement orders may not be inconsistent with the original judgment or constitute a material change in the substantive adjudication portions of the judgment. 14

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

12 TEX. R. CIV. P. 329b(d); *Comm'n for Lawyer Discipline v. DeNisco*, 132 S.W.3d 211, 215 (Tex. App.–Houston [14th Dist.] 2004, no pet.).

13 *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984); *see also* TEX. R. CIV. P. 329b(f).

14 *Denisco*, 132 S.W.3d at 215.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In this case, there is no dispute that RPI owes the judgment to Relator. RPI admits that the judgment is final and not appealable. RPI wants to prevent Relator from receiving the money owed under the judgment either temporarily, if Relator

wins the appeal of the 96th case, or permanently, if Nu-way wins the appeal, despite the fact that Relator is not a party to the suit in the 96th District Court.

Furthermore, the 342nd District Court recognized that it did not have the authority to modify the judgment and did not "have the authority to sign an order saying [that the judgment] wouldn't be paid out until such and such a date." Nevertheless, the court denied the release of the assets in the registry because of the suit in the 96th District Court; that is, the trial judge effectively did what he said he could not do.

Additionally, there is no order in the 96th preventing the release of the assets. The registry of the court was not subject to the garnishment, only RPI was subject to the garnishment, so there is nothing legally stopping the disbursement. In fact, the 96th District Court's judgment specifically found that Nu-Way had no interest in the registry assets. Thus, because the 342nd District Court judgment is final and not appealable, because no other order from any other court exists preventing the release of the assets, because RPI has failed to pay the judgment against it, and because the trial judge does not have jurisdiction to modify the judgment to restrict the timing of the disbursement, the trial court must perform the ministerial act of releasing the assets securing the amount owed by the judgment.

* * *

CONCLUSION

We therefore conditionally grant Relator's petition for writ of mandamus. We are confident that the trial court will vacate its order denying Relator's motion to release registry assets and order disbursement of the registry assets within fifteen days of the date of this opinion. Our writ will issue only if the trial court refuses to do so. Additionally, RPI's motion for sanctions is denied.

LEE ANN DAUPHINOT
JUSTICE

PANEL B: LIVINGSTON, DAUPHINOT, and HOLMAN, JJ.

DELIVERED: May 19, 2005

End of
Part 3–Other Materials (Items 13-21)

END OF APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
BY PETITIONER, BILLY R. DELP, JR.

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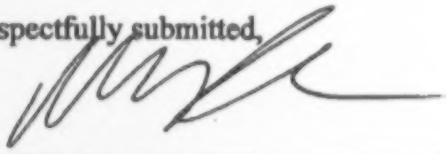
Respectfully submitted,



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Dated: September 12th, 2007.

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